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No. 98-535

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

TEXAS EDUCATION AGENCY,
Petitioner,

v.

KAREN HANSEN MESSER,
Respondent.

On Petition For Writ of Certiorari to the
United States Court of Appeals
For the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In a Title VII suit may the plaintiff show pretext under *St. Mary's Honor Center v. Hicks*, sufficient to defeat summary judgment, by relying only on evidence of race consciousness in personnel decisions concerning other employees in other departments at other times, without directly rebutting the reasonable nondiscriminatory justifications by the employer for the specific actions challenged by the plaintiff?

2. Does Title VII of the Civil Rights Act of 1964 incorporate Fourteenth Amendment equal protection requirements for affirmative action plans by state agencies complying with federal mandates for federal contractors, so that:

    a. the defense under section 42 U.S.C. §2000e-12(b) of the Civil Rights Act of 1964 is unavailable in a suit solely under Title VII;

    b. a goal of matching the workforce to the population is per se illegal;

    c. a plan must be discontinued when "parity" is reached, notwithstanding federal regulatory requirements for federal contractors?

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PETITION FOR A WRIT OF CERTIORARI

The Attorney General of Texas, on behalf of petitioners herein, the Texas Education Agency and an official of the Texas Education Agency, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals, reproduced at Appendix A, a1 - a24, is reported at *Messer v. Meno*, 130 F.3d 130 (5th Cir. 1997). The denial of the Suggestion for Rehearing En Banc is reproduced at Appendix B, a25. The opinion of the district court, reproduced at Appendix C, a26 - a62, is reported at *Messer v. Meno*, 936 F.Supp. 1280 (W. D. Tex. 1996).

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on December 11, 1997. Appendix A, a1. The court of appeals denied defendant's request for en banc review on June 25, 1998. Appendix B, a25. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, 42 U.S.C. §2000e-2(a)

It is "an unlawful employment practice for an employer . . . to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, term, conditions, or privileges of employment, because of such individual's race . . . ."

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, 42 U.S.C. §2000e-12(b)

"In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of . . . the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission . . . . Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that (A) after such act or omission, such interpretation or opinion is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect . . ."

29 CFR §1608.5

"Under Title VII, affirmative action compliance programs adopted pursuant to Executive Order No. 11246, as amended, and its implementing regulations, including 41 CFR Part 60-2 (Revised Order 4), will be considered by the Commission in light of the similar purposes of Title VII and the Executive Order, and the Commission's responsibility under Executive Order No. 12067 to avoid potential conflict among Federal equal employment opportunity programs."

41 C.F.R. §60-1.40(a)

"A necessary prerequisite to the development of a satisfactory affirmative action program is the identification and analysis of problem areas inherent in minority employment and an evaluation of opportunities for utilization of minority group personnel. The contractor's program shall provide in detail for specific steps to guarantee equal employment opportunity keyed to the problems and needs of members of minority groups, including, when there are deficiencies, the development of specific goals and time tables for the prompt achievement of full and equal employment opportunity."

STATEMENT OF THE CASE

The Texas Education Agency ("TEA") is an agency of the state of Texas and is also a federal contractor with the United States Department of Labor. As a federal contractor, TEA must have an affirmative action plan in compliance with United States Department of Labor regulations. 41 C.F.R. §60-1.40(a). Failure to comply with this requirement can result in the imposition of sanctions, including cancellation of the contract and ineligibility for future contracts. 41 C.F.R. §§60-1.1, 60-1.4(a)(6), 60-2.2.

TEA's affirmative action plan called for the recruitment of women and minorities for the pool of applicants for vacant positions but required that selection be based on qualifications, and prohibited discrimination on the basis of race of gender. The plan included the State Board of Education's goal that the TEA workforce reflect the population of Texas, but that the operational goals were tied to the state's available workforce.

When vacancies occurred at TEA, hiring managers were sent "utilization notices" reminding them of the racial and gender composition needed to meet "parity" in their units and asking them to consult the list of applicants by race and gender before making their selections. However, no such communications were shown with respect to the promotion and salary decisions at issue in plaintiff's case.

Plaintiff Karen Messer ("Messer"), a white female, was employed by TEA until April, 1996, attaining the position of Senior Director, Management and Budget Division. In 1993, Messer applied for a newly created position of Coordinator of Internal Operations. After the first round of interviews by a panel, Messer was among four finalists. Bill Monroe, a white male, was selected over Messer, an African-American male applicant, and another white male. Monroe scored highest in the final round of interviews (in which all applicants were asked the same questions and their answers were rated on the same scale); and was selected because of his previous experience as a state agency chief fiscal officer; his extensive experience in developing and monitoring budgets, government fiscal accounting methods, automated accounting systems, audit methods, strategic planning, and the legislative budget process; his excellent performance in the interviews, clearly demonstrating superior interpersonal and communication skills; the recommendations and impressions of panel members; and favorable reference responses.

As Messer acknowledged, Dr. Meno, the former Commissioner of Education, explained early in his administration that new senior directors were to be hired at the salary level necessary to attract them from their former positions. Thus, selectees already making higher salaries were paid more than the incumbent senior directors. Prior to being hired by TEA, each of the senior directors to whom plaintiff compares herself (two Hispanic males and two black females) was making a salary higher than Messer's at TEA. Three of the four took a pay cut to come to work at TEA. By contrast, nine out of ten whites selected as senior directors under Meno received a pay increase upon assuming that position.

While Dr. Meno was Commissioner of TEA, 80% of promotions, upward reclassifications, and salary increases went to white employees. From 1993 to 1995, the female share of the total TEA workforce grew from 61% to 65%. During the same period, women increased from 48% of TEA management to 52%, and from less than 56% of professional positions to over 60%. Among senior directors (Messer's position), women advanced from 44% of filled positions in January of 1994 to 54% in September of 1995.

Despite significant progress, at the time Messer filed suit, minority and women employees remained disproportionately concentrated (compared to their share of the Texas workforce in the relevant occupational categories) in lower-paid positions and relatively under represented in higher-paid positions. Although the female share of the TEA workforce overall exceeded the female proportion of the Texas population, women remained under represented (and therefore not "over-utilized") at the highest levels.

In January, 1995, while still employed at TEA, Messer filed suit under 42 U.S.C. §§1981 and 1983 in state court against the TEA and Lionel Meno, the former Commissioner of Education,

alleging race and gender discrimination in salary and promotions pursuant to an illegal affirmative action plan. The defendants removed the case to the United States District Court for the Western District of Texas based on federal question jurisdiction. After the suit was removed to federal court, Messer dismissed her claim against Texas Education Commission Meno personally and added a claim under Title VII, 42 U.S.C. §2000e.

On defendants' motions for summary judgment, the Honorable Stephen H. Capelle, United States Magistrate Judge, issued a Memorandum Opinion and a Final Judgment on July 8, 1996. The district court granted TEA's motions for summary judgment and dismissed all of plaintiff's claims. *Messer v. Meno*, 936 F.Supp. 1280, 1299 (W.D.Tex. 1996); App. C, a62.

On appeal, the United States Court of Appeals for the Fifth Circuit affirmed the district court's decision in part and reversed and remanded in part. *Messer v. Meno*, 130 F.3d 130; App. A, a19. The plaintiff argued on appeal only that the court erred in dismissing her Title VII claims.

The court of appeals affirmed the district court's dismissal of the plaintiff's Title VII retaliation claim and reversed and remanded the dismissal of plaintiff's Title VII discrimination claim. The Honorable Reynaldo G. Garza specially concurred, expressing reservation about the majority opinion. *Messer*, 130 F.3d at 140-143, App. A, a19-a24. Treating the defendants' petition for en banc review as a request for panel rehearing, the court of appeals denied defendant's request for en banc review on June 25, 1998. App. B, a25.

REASONS FOR GRANTING THE PETITION

This Petition for Writ of Certiorari calls the Court's attention to two important issues in federal employment discrimination law. The first issue concerns the standard for showing pretext in

employment discrimination cases under this Court's standard as set forth in *St. Mary's Honor Center v. Hicks*. The second issue raises concerns whether Title VII of the Civil Rights Act of 1964 incorporates Fourteenth Amendment equal protection requirements for affirmative action plans by public employers.

The Fifth Circuit's opinion in this case has dramatically changed the landscape in employment discrimination cases from what had previously appeared to exist. In light of this Court's decisions interpreting Title VII, the decision below is erroneous and the issues it addresses are important.

I. The Fifth Circuit's decision conflicts sharply with the standards enunciated by this Court by treating an affirmative action plan as creating an irrebuttable presumption of discrimination and thereby imposing on non-minority plaintiffs complaining of "reverse" discrimination a lighter burden than is placed on minority plaintiffs under Title VII.

The justification of the court of appeals' decision to reverse the grant of summary judgment in favor of the state agency employer is its assertion that the plaintiff raised a material fact issue regarding whether she was discriminated against *not* as a result of any evidence to rebut TEA's proffered reasons, but as a result of TEA's affirmative action plan and a purported agency-wide consciousness of race and gender. The result of this reasoning defies the Title VII standards handed down by this Court. The Fifth Circuit's reasoning creates an irrebutable presumption of discrimination based on the existence of an affirmative action plan alone and thereby imposes on non-minority plaintiffs complaining of "reverse" discrimination a lighter burden than is placed on minority plaintiffs under Title VII.

This Court's decision in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742 (1993), clarified the current burden-shifting federal standard under which Title VII employment discrimination claims are to be judged. Following introduction of the plaintiff's prima facie case of discrimination, the employer must articulate a legitimate, non-discriminatory reason for the employment action. *Hicks*, 509 U.S. at 506-07, 133 S.Ct. at 2747. If the employer meets this burden, the scheme of shifting burdens and the presumption "simply drops out of the picture." *Id.* at 511, 113 S.Ct. at 2749. To overcome the employer's articulated justification, the plaintiff must prove that the employer's "proffered reason was not the true reason for the employment decision." *Id.* at 508, 113 S.Ct. at 2747. According to this Court, an employer's proffered reason for making the employment decision at issue "cannot be proved to be a pretext for discrimination unless it is shown both that the reason was false, *and that discrimination was the real reason.*" *Id.* at 515, 113 S.Ct. at 2752 (emphasis added).

The Fifth Circuit agreed with the district court that TEA carried its burden of articulating legitimate non-discriminatory reasons for the challenged employment decisions. *Messer v. Meno*, 130 F.3d at 137, App. A, a12. Messer's only evidence to rebut TEA's proffered reasons is the agency's affirmative action plan. There is no evidence tending to indicate that the affirmative action plan had any bearing on Messer whatsoever. Likewise there is no other concrete evidence to rebut defendant's proffered reasons. Under this Court's decision in *Hicks*, this remote evidence would not be sufficient to carry the plaintiff's pretext burden. However, the majority opinion treats the existence of the affirmative action plan as raising an irrebuttable presumption of discrimination against non-minorities, sufficient to automatically refute TEA's legitimate, non-discriminatory reasons and preclude summary judgment for TEA.

By its decision in Messer's case, the Fifth Circuit has created a lighter standard for non-minority plaintiffs to show pretext. Only by treating the existence of an affirmative action plan as giving rise to an irrebuttable presumption of discrimination could the majority completely ignore four uncontroverted facts: that under Commissioner Meno, 80% of promotions, upward reclassifications, and salary increases went to white employees; that the female share of the TEA workforce grew from 61% to 65% (including from 48% to 52% in management); that the candidate promoted over Messer was more qualified for the position than she; and that the salary differential between Messer and the other senior directors was necessary for TEA to attract candidates for the position from their former positions. Instead, the court reasoned that the goal of a workforce matching the population, coupled with directives to managers to be aware of race and gender statistics, supported Messer's hypothesis that "TEA pursued [the] goal[s] of reducing the number of women in its workforce [and] reducing the number of whites in its workforce." *Messer*, 130 F.3d at 133, App. A, a4. That, in turn, was enough in the majority's view to raise a fact issue of pretext under Title VII, without requiring Messer to present evidence either (1) that any of TEA's proffered reasons for the particular promotion and salary decisions were untrue or (2) that the affirmative action plan was actually a factor in those specific decisions.

TEA reads this Court's decision in *Hicks* as requiring a plaintiff to directly rebut an employer's legitimate, nondiscriminatory reason. Messer, on the other hand, was not even required by the Fifth Circuit to prove that much. Instead, evidence suggesting that, in other times in other parts of the agency, TEA's affirmative action plan was misapplied to allow race to override qualifications for some other employees, automatically cancels out TEA's legitimate nondiscriminatory explanations for employment decisions in Messer's specific case. To appreciate the impact of the court's ruling and its legal

implications, it is important to examine the nature of Messer's evidence as measured against the standard applied in other Title VII cases.

Of the nine items highlighted by the court, only two concern Messer herself and not one pertains to the salary and promotion decisions at issue. *Messer*, 130 F.3d at 138-39, App. A, a13-a16. The two items concerning Messer, numbers 5 and 9, were offered as evidence that she was directed to request the ethnicity/gender list for applicants before making her selection. But Messer did not sue TEA for forcing her to select unwanted minority employees. She sued claiming that she herself had been passed over in promotion and held to a lower salary by the operation of affirmative action.

Because of the irrebuttable presumption it creates, the panel applies the *Hicks* test much differently to Messer's claims than other circuits have in prior Title VII cases to other plaintiffs' claims. Minority plaintiffs claiming discrimination under Title VII have been required to show a more direct link between agency-wide or company-wide practices and their own circumstances in order to show pretext and thereby rebut the employer's rationale. *See Ghane v. West*, 148 F.3d 979 (8th Cir. 1998) (Iranian plaintiff failed to show that his employer's proffered reasons for discharging him, including that he failed to meet project deadlines and that his written communications required extensive revisions, were pretext for race or national origin discrimination; employee complained only that non-Iranian employees suffered from same work deficiencies and that he was called an "Iranian" by a coworker); *Crim v. Board of Educ. Of Cairo School Dist. No. 1*, 147 F.3d 535 (7th Cir. 1998) (Black school superintendent failed to show that school board's reasons for not renewing his contract were pretext for race discrimination despite his argument contesting accuracy of some facts upon which board relied in making decision; each reason given in decision had some basis in fact and demonstrated board's dissatisfaction with his

performance); *Aramburu v. Boeing Co*, 112 F.3d 1398 (10th Cir. 1997) (Mexican plaintiff's evidence that other employees were not terminated for similar violations of work rules was insufficient to show pretext); *Chock v. Northwest Airlines, Inc.*, 113 F.3d 861 (8th Cir. 1997) (Asian plaintiff failed to show pretext in race discrimination claim where employee did not satisfy basic qualification of twelve months in current position and selected candidates had higher interview scores or more management experience than employee); *Holifield v. Reno*, 115 F.3d 1555 (11th Cir. 1997) (Black doctor failed to show pretext in race discrimination claim by asserting that his supervisors documented untrue assessments of his performance); *Betkerur v. Aultman Hosp. Ass'n*, 78 F.3d 1079 (6th Cir. 1996) (Indian doctor who claimed race discrimination where hospital gave director of neonatology position to another candidate failed to show that hospital's proffered reasons were pretextual; discriminatory remarks made by non-decisionmakers were properly discounted by district court and statements allegedly made to neonatologist about hospital's discriminatory motives were merely conclusory); *Lidge-Myrtil v. Deere & Co.*, 49 F.3d 1308 (8th Cir. 1995) (Black plaintiff failed to show that employer's proffered rationale for not promoting black employee, that person hired was more qualified than employee, was pretextual in race discrimination action where employee's abilities alone could not rebut employer's stated belief that person hired better exemplified standard of conduct necessary for position).

Previously in the Fifth Circuit, minority plaintiffs have faced exclusion of extraneous evidence offered to show pretext. *See Swanson v. General Services Adm.*, 110 F.3d 1180 (5th Cir. 1997) (in black plaintiff's Title VII claim, other black employees who would testify about discrimination they experienced were properly excluded because they did not work in plaintiff's office "and could not testify to Swanson's work environment . . . or to his relations with [his supervisor]"); same for age discrimination plaintiffs, *Cf.*, *Nichols v. Loral Vought Systems Corp.*, 81 F.3d 38 (5th Cir. 1996)

(allegedly discriminatory remarks by supervisor who was not the relevant decision-maker as to plaintiff were not probative); *Mooney v. Aramco Services Co.*, 54 F.3d 1207 (5th Cir. 1995) ("Testimony of anecdotal witnesses with different supervisors, working in different parts of the company was simply too attenuated" to show pretext).

Unavoidably, under the court of appeals' formulation, public employers will be drawn into an undertaking which disserves the congressional intent of Title VII and EEOC guidelines—abandoning self-evaluation altogether. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44, 94 S.Ct. 1011, 1017 (1974) (Congress intended voluntary compliance to be the preferred means of achieving the objectives of Title VII); *see also Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-418, 95 S.Ct. 2362, 2371-2372 (1975)(*quoting United States v. N.L. Industries, Inc.*, 479 F.2d 354, 379 (8th Cir. 1973)) (Title VII sanctions intended to cause employers "to self-examine and self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history' "); *see also Teamsters v. United States*, 431 U.S. 324, 364, 97 S.Ct. 1843, 1869 (1977); *Ford Motor Co. v. EEOC*, 458 U.S. 219, 228, 102 S.Ct. 3057, 3063 (1982); *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 770-771, 103 S.Ct. 2177, 2185-86 (1983).

This view is shared by the Equal Employment Opportunity Commission, which has promulgated guidelines setting forth its understanding that "Congress strongly encouraged employers ... to act on a voluntary basis to modify employment practices and systems which constituted barriers to equal employment opportunity. . . ." 29 C.F.R. §1608.1(b)(1985). According to the EEOC, "[t]he principle of nondiscrimination in employment because of race, color, religion, sex, or national origin, and the principle that each person subject to Title VII should take voluntary action to correct the effects of past discrimination and to

prevent present and future discrimination without awaiting litigation, are mutually consistent and interdependent methods of addressing social and economic conditions which precipitated the enactment of Title VII. Voluntary affirmative action to improve opportunities for minorities and women must be encouraged and protected in order to carry out the Congressional intent embodied in Title VII . . . Correspondingly, Title VII must be construed to permit such voluntary action, and those taking such action should be afforded the protection against title VII liability which the Commission is authorized to provide under section 713(b)(1)." 28 U.S.C. §1608.1(c) (footnote omitted).

The Fifth Circuit's ruling rests upon an assumed connection between an affirmative action plan and discrimination that does not necessarily (and in this case does not in fact) exist. In Messer's case, the majority opinion did not recite any evidence rebutting any of the particular reasons listed by the defendants and the district court for Monroe's selection and the four minority directors' salaries because Messer did not offer any. For the majority, it was enough that Messer had evidence of affirmative action in the hiring of other employees. As the Fifth Circuit's decision stands, it creates a lighter burden on non-minority plaintiffs complaining of reverse discrimination by allowing evidence of an affirmative action plan and race consciousness in employment decisions concerning other employees in other departments at other times without directly rebutting the legitimate, non-discriminatory reasons offered by the employer. If that is to be the standard, it is vitally important to TEA, the courts, and all public employers that this Court say so.

II. The Fifth Circuit departed from the decisions of this Court and congressional intent by evaluating a public employer's affirmative action plan under constitutional equal protection standards in a Title VII case.

This Court's decisions teach the difference between Title VII jurisprudence and equal protection jurisprudence when interpreting affirmative action plans. The Fifth Circuit embraced the strict scrutiny analysis in order to find a fact issue regarding Messer's individual Title VII claim, but that analysis finds no support in this Court's decisions.

Although the Fifth Circuit acknowledged that the plaintiff argued "on appeal that the court *erred only in dismissing her Title VII claims*",[1] the court contradicts this admission earlier in its own opinion when it states that "[t]his case presents the question whether a white woman plaintiff was *unconstitutionally* discriminated against . . . ."[2] After accurately pointing out that the only issue on appeal was her Title VII claims, the court then analyzed plaintiff's Title VII claims under the strict scrutiny standard and equal protection precedent, including *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989); *Wygant v. Jackson Bd. Of Educ.*, 476 U.S. 267, 273-74 (1986);and *Hopwood v. State of Texas*, 78 F.3d 932, 940 (5th Cir. 1996), *cert. denied*, — U.S. —, 116 S.Ct. 2581 (1996).

A critical distinction between *Adarand, Croson, Wygant*, and *Hopwood* and this case, not discussed by the majority, is that all were decided on constitutional equal protection grounds. In this case, the plaintiff acknowledged on appeal that she abandoned her constitutional claims and proceeded on appeal solely under Title

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[1] *Messer*, 130 F.3d at 134, App. A, a4. (emphasis added)

[2] *Messer*, 130 F.3d at 133, App. A, a2. (emphasis added).

VII, 42 U.S.C. §2000e. *Messer*, 130 F.3d at 134, App. A, a4. The Fifth Circuit misapplied *Adarand, Croson, Wygant,* and *Hopwood.* None are proper precedent for Messer's Title VII case. Equal protection was not a legal issue in Messer's appeal, and the court below was, at least on one page of its opinion, aware of this fact.

In his special concurrence, Judge Garza expressed his justified concern that by "its rather sweeping dicta regarding the constitutionality and standards of review for affirmative action policies . . . the majority is attempting to quietly expand *Hopwood's* empire into the realm of employment law ..., a move which is both hasty and unnecessary. . . ." *Messer v. Meno*, 130 F.3d at 141, (Garza, J., specially concurring), App. A, a20.

This Court has instructed in the past that where the lawsuit does not raise a constitutional issue regarding an affirmative action plan, that it may only be judged under Title VII. *Johnson v. Transportation Agency*, 480 U.S. 616, 628 n.6 (1987). In *Johnson*, this Court noted that "[n]o constitutional issue was either raised or addressed in the litigation below . . ." and that the Court could therefore "decide in th[at] case *only* the issue of the prohibitory scope of Title VII. Of course, where the issue is *properly raised*, public employers must justify the adoption and implementation of a voluntary affirmative action plan under the Equal Protection Clause." *Johnson*, 480 U.S. 616, 620, 107 S.Ct. 1442, 1446 (*citing Wygant*, 476 U.S. 267, 106 S.Ct. 1842) (emphasis added). The court below was not so careful.

The implications of the Fifth Circuit's application of equal protection standards to a Title VII case is considerable, for this Court has held that the obligations of a public employer under Title VII are not the same as its obligations under the Constitution. *Johnson*, 480 U.S. at 628 n.6. This Court has stated on more than one occasion that Title VII was enacted pursuant to the commerce power and was not intended to incorporate and particularize the commands of the Fifth and Fourteenth Amendments. *United Steel*

Workers of America v. Weber, 443 U.S. 193, 206 n.6 (1979); *Johnson*, 480 U.S. at 628 n.6.

While public employers were added to the definition of "employer" in Title VII in 1972, there is no evidence that this mere addition to the definitional section of the statute was intended to transform the substantive standard governing employer conduct. Indeed, "Congress expressly indicated the intent that the same Title VII principles be applied to governmental and private employers alike." *Dothard v. Rawlinson*, 433 U.S. 321, 332, n. 14, 97 S.Ct. 2720, 2728, n. 14 (1977). The fact that a public employer must also satisfy the Constitution does not negate the fact that the statutory prohibition with which that employer must contend was not intended to extend as far as that of the Constitution.

Because the Fifth Circuit analyzed Messer's appeal under equal protection standards rather than as a Title VII case, it improperly rejected TEA's statutory defense. Under section 713(b) of Title VII, 42 U.S.C. § 2000e-12(b), an employer cannot be held liable for acting in conformity with and in reliance on an EEOC interpretation of Title VII. Under EEOC regulations, that defense protects an employer who adopts an affirmative action plan in order to comply with U.S. Department of Labor requirements for federal contractors. 29 C.F.R. § 1608.5(b). It was undisputed in the record, as found by the trial court, that, as a federal contractor, TEA adopted its affirmative action plan pursuant to Department of Labor regulations.

Relying on its prior *Hopwood* decision, the court "rejected the notion that a state actor's compliance with federal mandates insulates the state from liability for discrimination" in an affirmative action plan, without alluding to section 713(b). *Messer*, 130 F.3d at 136, App. A, a10 (*citing Miller v. Johnson*, 515 U.S. 900, 921-923, 115 S.Ct. 2475, 2491 (1995). It may well be that § 713(b) would provide no defense to a *Hopwood*-style §1983 equal protection claim. But the court offered no authority

for ignoring it as a defense to a Title VII claim.

The Fifth Circuit's decision also places public employers who serve as federal contractors in a serious bind. Reading this Court's Title VII jurisprudence along with the court of appeals opinion in this case does not enable a court or state agency to decide whether to comply with the federal requirements under 41 C.F.R. §60-1.40(a) and invoke the defense under 42 U.S.C. §2000e-12(b) or read the Fifth Circuit's decision and, in order to avoid Title VII liability, eliminate their affirmative action plans and face termination of their federal contracts. What is more disconcerting is that, under the majority opinion, state agencies will not know whether the courts will apply Title VII or equal protection standards to their affirmative action plans. The court of appeals decision creates a legal dilemma that forces public employers to choose between compliance with requirements for federal contractors or discontinuing their affirmative action plans in order to avoid either Title VII or equal protection violations. This Court's jurisprudence presently does not resolve the dilemma. If Title VII incorporates the constitutional strict scrutiny standard in analyzing affirmative action plans, it is vitally important to TEA, the courts, and all public employers that this Court say so.

III. The Question Presented Is Important

Whether Title VII incorporates equal protection standards for affirmative action is a matter of more than academic importance to state agency employers. Fourteenth Amendment constitutional protections are enforced through the Civil Rights Act of 1871, 42 U.S.C. §1983. *Burns-Toole v. Byrne,* 11 F.3d 1270, 1273 n.3 (5th Cir. 1994), *cert. denied*, 512 U.S. 1207, 114 S.Ct. 2680 (1994). Section 1983 does not abrogate a state agency's Eleventh Amendment immunity. *Quern v. Jordan*, 440 U.S. 332, 341, 99 S.Ct. 1139, 1145 (1979); *see also Will v. Michigan Dept. of Police*, 491 U.S. 58, 64-65, 109 S.Ct. 2304, 2308-09 (1989) (a state agency is not a "person" within the meaning of §1983).

Consequently, a §1983 claim for damages may be brought only against an individual official in his personal capacity. *Hafer v. Melo*, 502 U.S. 21, 31, 112 S.Ct. 358, 364 (1991). Further, such a claim is circumscribed by qualified immunity. *Crawford El v. Britton*, – U.S. –, 118 S.Ct. 1584, 1591 (1998) (*citing Harlow v. Fitzgerald*, 457 U.S. 800, 813, 102 S.Ct. 2727, 2736 (1982)).

By contrast, Title VII abrogates a state's Eleventh Amendment immunity. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456, 96 S.Ct. 2666, 2671 (1976). Under Title VII, a plaintiff may recover damages directly from a state agency. 42 U.S.C. §1981(a)(1).

CONCLUSION

As a consequence of all the foregoing, this Court's review of the issues presented in this petition is necessary to promote uniformity and consistency in the application of important federal law.

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Karen Hansen Messer,
Plaintiff-Appellant

v.

Lionel R. Meno, in his former capacity
as the Texas Commissioner of Education,
the Texas Education Agency, and Mike Moses
as the Texas Commissioner of Education,
Defendants-Appellees.

No. 96-50605

United States Court of Appeals,
Fifth Circuit

Dec. 11, 1997.

White female employee of state education agency brought discrimination action against agency and former and present state Commissioners of Education. Defendants moved for summary judgment. The United States District Court for the Western District of Texas, Stephen H. Capelle, United States Magistrate Judge, 936 F.Supp. 1280, granted motions and dismissed claims. Employee appealed. The Court of Appeals, Edith H. Jones, Circuit Judge, held that: (I) fact issues as to whether discrimination claim based on promotion of black male over employee was timely raised precluded summary judgment for defendants; (2) agency offered legitimate, nondiscriminatory reasons for promoting white male over employee and paying four minority directors at higher rate than employee; (3) fact issues regarding whether employee was discriminated against in specific agency employment decisions as result of agency's affirmative action plan precluded summary judgment for defendants; and (4) allegations of retaliation did not involve adverse personnel action, and thus could not support employee's retaliation claim.

Affirmed in part; reversed and remanded in part.

Reynaldo G. Garza, Circuit Judge, concurred specially and filed a separate opinion.

Joseph P. Webber, Austin, TX, for Plaintiff-Appellant.

James C. Todd, Assistant Attorney General, Austin, TX, for Defendants-Appellees.

Appeal from the United States District Court for the Western District of Texas.

Before REYNALDO G. GARZA, HIGGINBOTHAM and JONES Circuit Judges.

EDITH H. JONES, Circuit Judge:

This case presents the question whether a white woman plaintiff was unconstitutionally discriminated against in salary and promotion opportunities in the Texas Education Agency, because throughout the relevant period the agency aspired to balance its workforce according to the gender and racial balance of the state. The Agency defends its affirmative action plans and denies that their implementation had anything to do with the plaintiff's individual career. We find genuine issues of material fact; TEA's favorable summary judgment is, for the most part, reversed and the case remanded.

BACKGROUND

Appellant Karen Messer was employed by the Texas Education Agency (the "TEA") from 1978 to1996, when she resigned from her position as Senior Director of the Budget Management Division to accept a position with the Texas Employment Commission (presently the Texas Workforce

Commission (the "TWC")). Messer alleges that she was denied two promotions and was under compensated because of her race and gender and that she resigned her position at TEA after suffering retaliation because of her complaints.

Throughout Messer's employment at TEA, the agency implemented and enforced affirmative action plans ("AAPs") that embodied TEA's commitment to "diversity" in its workforce. The AAPs have been revised and re-adopted annually. Until 1995, they expressed the goal of achieving "a workforce balanced with a proportionate number of minorities and women in the population." In 1995, the slightly modified goal of TEA's AAP was to "achieve a workforce balanced with a proportionate number of minorities and women in the workforce." Over the years, TEA painstakingly created, maintained, and analyzed statistics concerning the ethnic and gender makeup of its employees and applicants for employment. Monthly reports--known as utilization reports--monitored the number and proportion of minorities and women in TEA's workforce. These reports were apparently distributed each time a job vacancy opened within TEA. Among other evidence of race-conscious employment policies, TEA's Recruitment and Hiring Guidelines instructed its employees, in part:

Managers should survey their staffing patterns, especially concerning race and sex, when vacancies occur. While persons must ultimately be employed on the basis of job-related criteria, the needs of the unit, which include balanced workforce considerations, should have significant influence on employment decisions.

Messer contends that supervisors based hiring and other employment decisions on race and gender rather than superior merit. She asserts that because, in comparison to the Texas population, women were overrepresented in TEA's workforce, she was discriminated against as a woman when, pursuant to the

AAPs, TEA pursued its goal of reducing the number of women in its workforce. Similarly, Messer compiains that because, in comparison to the state's population, minorities were underrepresented in some parts of TEA's workforce, she was discriminated against for the sake of TEA's goal of reducing the number of whites in its workforce. More broadly, Messer challenges TEA's AAPs as unconstitutionally discriminatory on the basis of race and sex.

Pursuant to the AAPs, the defendants allegedly discriminated against her in three distinct situations: (1) reclassifying (or as she asserts, "promoting") a black male to a newly created position of TEA "Coordinator" on or about January 1992; (2) selecting a white male over Messer for Coordinator of Internal Operations in January 1994;[FN1] and (3) paying higher salaries to four senior directors (two black females and two Hispanic males) who held identical positions and performed work comparable to hers.

FN1. Messer contends she was discriminated against in favor of a man because she belonged to an "overutilized" group at TEA – women.

Messer filed her formal charge of discrimination with the Equal Employment Opportunity Commission on or about November 2, 1994. She then sued the appellees contending violations of 42 U.S.C. §§ 1981, 1983, and Title VII for alleged race and sex discriminstion and asserted a state law breach of contract claim. The magistrate judge granted the defendants' motions for summary judgment and dismissed all of Messer's claims. See *Messer v. Meno*, 936 F.Supp. 1280, 1299 (W.D.Tex.1996). Messer argues on appeal that the court erred only in dismissing her Title VII claims.

STANDARD OF REVIEW

This court reviews the grant of summary judgment de novo, applying the same standards as the magistrate judge. See *Duffy v. Leading Edge Products, Inc.*, 44 F.3d 308, 312 (5th Cir.1995). Summary judgment is appropriate, when, viewing the evidence in the light most favorable to the nonmoving party, the record reflects that no genuine issue of any material fact exists, and the moving party is entitled to judgment as a matter of law. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24, 106 S.Ct. 2548, 2552-53 (1986); Fed.R.Civ.P. 56(c). Once the movant carries his burden, "the nonmovant must go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial." *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994).

ANALYSIS

A. The Timeliness of Messer's Lost Promotion Claims

Administrative review is normally first required before judicial review of a discrimination complaint. See *Gottlieb v. Tulane University*, 809 F.2d 278, 284 n. 8 (5th Cir.1987). A Title VII plaintiff must file a charge of discrimination with the EEOC no more than three hundred days after learning of an adverse employment decision in a referral state. See *Washington v. Patlis*, 868 F.2d 172. 175 (5th Cir.1989) [FN2].

> FN2. Pursuant to Section 706(e) of Title VII, a plaintiff must file a charge of employment discrimination "within one hundred and eighty days after the alleged unlawful employment practice occurred, . . . except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice, . . . such charge shall be filed by

> or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred." This court has held that "the requirement that persons aggrieved must initially institute proceedings with the state referral agency is met by the EEOC's routine transmittal of a copy of the complaint to the state referral agency." *Urrutia v. Valero Energy Corp.*, 841 F.2d 123, 125 (5th Cir.1988). Neither party contests that the EEOC routinely transmitted a copy of Messer's complaint to the Texas Commission on Human Rights, the Texas referral agency, so the default limitations period is three hundred days.

The magistrate judge held Messer's first complaint involving the promotion of Jim Johnson, a black male, was time barred. See *Messer v. Meno*, 936 F.Supp. 1280, 1295 (W.D.Tex.1996). Johnson was named to a newly created "Coordinator" position in January, 1992, but Messer did not file an EEOC discrimination charge until November, 1994, more than 300 days after notice of the employment action of which she now complains. Messer argues her complaint for this employment action was not time-barred, however, because it was part of a continuing violation of Title VII.

The continuing violation theory relieves a plaintiff of establishing that all of the complained-of conduct occurred within the actionable period if the plaintiff can show a series of related acts, one or more of which falls within the limitations period. See *Berry v. Board of Supervisors of LSU*, 715 F.2d 971, 979 (5th Cir.1983). As this court has explained:

> The core idea [of the continuing violations theory,] however, is that [e]quitable considerations may very well require that the filing periods not begin to run until facts supportive of a Title VII charge or civil rights action are or should be apparent to a reasonably prudent person

similarly situated. The focus is on what event, in fairness and logic, should have alerted the average lay person to act to protect his rights. At the same time, the mere perpetuation of the effects of time-barred discrimination does not constitute a violation of Title VII in the absence of independent actionable conduct occurring within the statutory period .... *Glass v. Petro-Tex Chem. Corp.*, 757 F.2d 1554, 1560-61 (5th Cir.1985) (quotations, citations, and footnote omitted). Thus, a plaintiff can avoid a limitations bar for an event that fails to fall within the statutory period where there is "[a] persisting and continuing system of discriminatory practices in promotion or transfer [that] produces effects that may not manifest themselves as individually discriminatory except in cumulation over a period of time." Id. at 1561. See also *Rendon v. AT & T Technologies*, 883 F.2d 388, 395-96 (5th Cir.1989); *Hendrix v. City of Yazoo City, Miss.*, 911 F.2d 1102, 1103-04 (5th Cir.1990); *Alldread v. City of Grenada*. 988 F.2d 1425. 1430-32 (5th Cir.1993).

In the instant case, the magistrate judge found that Messer's claim, based on the 1992 selection of a black male over her, was time-barred because (1) the two refusals to promote of which Messer complained were discrete individual actions, not interrelated events constituting a continuing violation; and (2) Messer failed to mention racial discrimination in her 1994 EEOC complaint. See *Messer*, 936 F.Supp. 1280, 1295 (W.D.Tex.1996).

The second reason is contrary to the record. Messer complained of racial discrimination and specifically mentioned Jim Johnson in supporting documentation submitted to the EEOC that expanded on her allegations of discrimination. Further, the allegations of discrimination in her EEOC complaints alluded to unspecified incidents of racial discrimination.

Whether the first reason, rejecting the continuity or relatedness of employment decisions regarding Messer, is correct is a closer question requiring further factual and legal development. The magistrate judge's offhand dismissal of Messer's assertion ignores her theory of the case, supported for summary judgment purposes with adequate evidence, that TEA systematically promoted employees based on racial and gender criteria found in the utilization reports. On the other hand, because Messer participated in this system for fourteen years before being denied the 1992 promotion, one wonders that she did not know enough to file a timely discrimination complaint. These questions were not explored by the parties or the court in light of our authorities, and we leave them open on remand.

TEA also asserts that the claim based on the 1994 promotion of a white male over Messer is time-barred because it occurred more than three hundred days before Messer filed an EEOC complaint. The magistrate judge found for purposes of summary judgment that Messer had successfully raised a fact issue regarding the timeliness of her complaint. See *Messer*, 936 F.Supp. at 1295- 96. Indeed she did. TEA's failure to cite or refute the record not only waives this complaint on appeal but demonstrates the lack of evidence in the agency's favor.

B. Whether TEA Discriminated Against Messer.

Underlying Messer's claims are two premises: first, that TEA published and implemented a system of racial and gender preferences in its hiring and employment decisions; and second, that the implementation of this policy resulted in discrimination against her in the two promotion decisions and in a relatively unfavorable compensation rate compared with similarly situated minority employees.

We first consider the general charge of race-conscious employment practices. "[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227, 115 S.Ct. 2097, 2113, 132 L.Ed.2d 158 (1995); see also *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94, 109 S.Ct. 706, 721-22, 102 L.Ed.2d 854 (1989); *Hopwood v. State of Texas*, 78 F.3d 932, 940 (5th Cir.), *cert. denied*, __ U.S. __, 116 S.Ct. 2581, 135 L.Ed.2d 1095 (1996). Such classifications "must serve a compelling government interest, and must be narrowly tailored to further that interest." *Adaran*d, 515 U.S. at 235, 115 S.Ct. at 2117. Although a state actor may use racial classifications when the evidence provides a strong basis for finding that it is necessary to remedy prior discrimination, see *Croson*, 488 U.S. at 500, 109 S.Ct. at 725, societal discrimination alone is not sufficient to justify a racial classification, see *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274, 106 S.Ct. 1842, 1847, 90 L.Ed.2d 260 (1986). "A free people whose institutions are founded upon the doctrine of equality should tolerate no retreat from the principle that government may treat people differently because of their race only for the most compelling reasons." *Adarand*, 515 U.S. at 227, 115 S.Ct. at 2113 (citation and internal quotations omitted). Diversity programs, no matter how well-meaning, are not constitutionally permissible absent a specific showing of prior discrimination, because " 'good intentions' alone are not enough to sustain a supposedly 'benign' racial classification." *Id.* at 228-29, 115 S.Ct. at 2113; see also *Hopwood*, 78 F.3d at 94546 (holding that "the use of ethnic diversity simply to achieve racial heterogeneity, even as part of the consideration of a number of factors, is unconstitutional").

In the instant case, the magistrate judge found that "the existence of an affirmative action plan" provides a "nondiscriminatory rationale" that rebuts any presumption of discrimination and shifts the burden to the plaintiff to show the

plan is invalid. See *Messer v. Meno*, 936 F.Supp. 1280, 1293 (W.D.Tex.1996). The magistrate judge also observed that not only were the AAPs implemented at TEA not designed to correct past discrimination, but there was presently no manifest racial or sexual imbalance. He opined, nevertheless, that because "affirmative action plans are still required for all federal contractors," past discrimination and present imbalance cannot be a requirement for constitutionality." *Id.* at 1293-94.

To the extent that the court found that racial preferences are constitutional in the absence of remedial action to counteract past provable discrimination, it erred. The Supreme Court has "insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination." *Wygant*, 476 U.S. at 274, 106 S.Ct. at 1847; see also *Croson*, 488 U.S. at 498-99, 109 S.Ct. at 724. Further, the Supreme Court has rejected the notion that a state actor's compliance with federal mandates insulates the state from liability for discrimination. See *Miller v. Johnson*, 515 U.S. 900, 921-23, 115 S.Ct. 2475, 2491, 132 L.Ed.2d 762 (1995) (state "compliance with federal antidiscrimination laws cannot justify race-based districting where the challenged [congressional] district was not reasonably necessary under a constitutional reading and application of those laws") (emphasis added); see also *Hopwood*, 78 F.3d at 954 (the racial preference program of a local governmental unit is subject to strict scrutiny even if the unit is ordered to adopt the program).

TEA does not attempt to argue on appeal that it could constitutionally make racial preferences in hiring or promoting employees pursuant to its AAPs; rather, it argues its AAPs were confined merely to recruitment efforts, and that hiring, promotion, and compensation decisions were based on merit, not race. [FN3] The issue before this court is whether any of Messer's claims of discrimination involve factual issues precluding summary judgment. As will be seen, both the scope of the AAP's and their

impact on Messer's employment are subject to genuine dispute[FN4]. If the trier of fact finds that the AAP's effected racial or gender considerations in employment decisions and particularly in Messer's case, then an appropriate remedy must be fashioned.

FN3. Without conceding that TEA actively gave racial preferences, TEA does point out that the Texas Legislature in 1989 adopted a finding that TEA employed "substantially below the available minorities for one or more [occupational] categories in the total civilian labor force [and] that, historically," TEA had "not employed . . . minorities in proportion to their available numbers in the civilian labor force," 1989 Tex. Sess. Law Serv. 5812 (West). In 1991 and 1993, the Legislature re-adopted the same findings by reference. See 1991 Tex. Sess. Law Serv. 1041 (West); 1993 Tex. Sess. Law Serv. 5377 (West). Such a finding does not alone constitute a compelling interest, however. As the Supreme Court observed in *Croson*, "Racial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice." *Croson*, 488 U.S. at 500, 109 S.Ct. at 725. Moreover, the effect of Croson was to "unequivocally restrict [ ] the proper scope of the remedial interest to the state actor that had previously discriminated." *Hopwood*, 78 F.3d at 954. TEA points to no evidence that would show the agency has discriminated on the basis of race or sex other than in the pursuit of implementing its AAP.

FN4. We note that TEA AAPs in the record through 1995 continued to state as part of the "Goals for the Texas Education Agency": The overall goal of the Texas Education Agency, therefore, is to have a staff that reflects the ethnic composition of the Texas population.

1990 Census
Male 49.3
Female 50.7
White 60.3
Black 11.9
Hispanic 25.5
Other 2.3

The combination of this language and U.S. Census statistics obviously raises concern that the AAP on its face mandates an unconstitutional quota system.

Messer's individual Title VII claims must be tested by the burden-shifting formula outlined in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). Following introduction of the plaintiffs prima facie case of discrimination, the employer must articulate a legitimate, non-discriminatory reason for the employment action. See, *Id.* at 506-07, 113 S.Ct. at 2747. If the employer meets this burden, the scheme of shifting burdens and presumptions "simply drops out of the picture," and "the trier of fact proceeds to decide the ultimate question: whether plaintiff has proved 'that the defendant intentionally discriminated against [him] because of his race.' " *Id.* at 511, 113 S.Ct. at 2749 (internal citation omitted).

The magistrate judge found, and we agree, that in each of the five instances of discrimination remaining after the 1992 promotion claim had been dismissed, TEA produced a legitimate, non-discriminatory reason for its decision. Monroe, to begin with, was allegedly recommended over Messer by an interview panel because he scored the highest in objective questioning. See *Messer*, 936 F. Supp. 1296. Additionally, Monroe's qualifications were "more than adequate" for the position to which he was promoted. *Id.* As for the four minority directors who were higher paid than Messer, the court found that "even viewed in the light most favorable to the Plaintiff, these directors were qualified for

their positions." *Id.* TEA argued that the directors were hired to work for a higher compensation rate than Messer because they were" 'lure[d]' " from outside the agency and in three cases, came to TEA with a significant reduction in salary. The court deemed this a credible, non- discriminatory reason for the pay difference and dismissed all of these claims because it found that Messer's evidence failed to show that TEA's proffered reasons for these decisions were pretextual. *Id.*

In his conclusion on pretext, however, the magistrate judge arbitrarily discounted Messer's evidence that the AAP was vigorously enforced to ensure that TEA's workforce would resemble as closely as possible the state's racial and gender breakdown. Messer cites many portions of the record to substantiate the discriminatory impact of TEA's affirmative action policy. Among the evidence is the following:

1. From 1989-1994, TEA AAP's stated as their purpose: "The overall objective of this plan is to achieve a workforce balanced with a proportionate number of minorities and women in the population. This balance is to be realized in all levels of responsibility within the Agency." In the 1995 AAP, the phrase "in the population" was replaced with "in the workforce," but the part of the AAP articulation of the "Goals for the Texas Education Agency" retained the following language from 1989-95: "The overall goal of the Texas Education Agency . . . is to have a staff that reflects the ethnic composition of the Texas population."

2. In a November 11, 1993 letter from Commissioner Meno entitled "Report on Ethnic/Gender Distribution of Texas Education Agency Personnel," Commissioner Meno wrote that TEA "continues to implement the goal of the State Board of Education to achieve a staff balanced both in ethnicity and gender and reflecting as nearly as possible the ethnic composition of the state as a whole." The letter also listed a breakdown of the number and type of minorities hired for the previous year.

3. A November 5, 1991 letter from the Division Director of the Division of Personnel and Staff Development to the Agency Hiring Managers states: "In specific response to the Governor's goal for a balanced workforce, the Agency reiterated the State Board of Education's existing goal to 'ensure that the Agency's hiring and promotion practices produce a workforce that reflects the ethnic and gender diversity of the state's population.'" The letter also stated: "An EEO/AA utilization report will be provided to each division director indicadng utilization of the protected classes. If an underudlization exists in a particular protected class, every available means will be taken to eliminate this underutilization." The letter ended by encouraging the Hiring Managers to refer to certain affirmative action related materials "frequently in your staff recruitment efforts and hiring decisions." (emphasis added.)

4. Submitted with the November 5, 1991 letter were the Recruitment and Hiring Guidelines, which stated at the beginning: "Managers should survey their staffing patterns, especially concerning race and sex, when vacancies occur. While persons must ultimately be employed on the basis of job-related criteria, the needs of the unit, which include balanced workforce considerations, should have significant influence on employment decisions.... Remember, it is not required that the most qualified applicant be hired, only that the person hired meet the minimum qualifications set for the position." The Guidelines urged a "rational basis" for recommending an applicant not as qualified as others, but warned that "[c]redible reasons for your recommendation become absolutely critical if the person recommended belongs to an over-utilized race and/or gender." (emphasis added.)

5. A letter from the Division of Human Resources to Linda Cimusz, Messer's supervisor from January through August 1992, compares a breakdown of departmental staffing statistics with the general work force, and instructing: "Please request the

ethnicity/gender list of applicants for your position once the posting dates have expired or you are preparing to make a selection. This will enable you to review pertinent job factors with ethnicity/gender applicants." (emphasis added.)

6. A 1991 letter from Larry D. Loiselle, former TEA Equal Opportunity Coordinator, and Sophie Reeder stated that the "Chairperson for the SBOE Personnel Subcommittee, has further placed pressure on Personnel to hire Hispanics due to the Hispanic population increasing as a percentage of the total population of the State." The letter recommended Pete Garcia, an Hispanic applicant, for a certain position, but noted "controversy from concerned, high level black employees," and added as a second option: "Hire Peter Garcia to manage the compensation and benefits section.... We could hire a black employee much more easily as a Position Classification Analyst position, level 17."

7. TEA AAP "Under-utilization Notices" (which provided a breakdown of positions and the races of the applicants, and a breakdown of employment transactions (hiring, firing, promotion, etc.) and the races of the affected employees) were issued each time a job vacancy opened. For instance, in August 1993 TEA processed 29 job vacancy notices and 29 AAP Under- utilization notices, while in April 1994, TEA processed 30 job vacancy notices and 30 AAP Under-utilization notices.

8. A flurry of handwritten notes from TEA employees regarding job vacancies contain statements such as "Meets Parity in the employment of females but needs 2 minorities to meet parity," (R. at 01588), or "The Dept. For Finance needs 3 minorities to meet Parity in employment in Job Group Category 'G,' which includes Accounting Clerk III, [sic] Accordingly, a letter regarding underutilization is required. They meet Parity in the employment of females in Cited Category." Messer contends these letters indicate that individuals not in the desired category were discriminated against through the application of the AAP.

9. Immediately prior to resigning, Messer was directed by a January 8, 1996 AAP Under-utilization report to hire a Hispanic in her division.[FN5]

FN5. Messer's allegation is substantially supported by a memorandum in the record (regarding a job vacancy notice) that was forwarded to Bill Monroe and Karen Messer from TEA's Division of Human Resources. The memorandum, which was dated January 8, 1996, states in part: "The State Board of Education has recently reaffirmed its goal for the Agency to employ minorities and women as close to the ethnic composition of the State as a whole. Additionally, the [AAP] identifies deficiencies in staffing and the need for hiring qualified minorities and women by EEO-4 categories. . . . [T]he following are deficiencies in State Board and Work Force staffing." Following a breakdown of minorities compared to the general population and the workforce which listed Hispanics as the only specifically identified minority race in deficiency, the memorandum went on to state: "Please request the ethnicity/gender list of applicants for your position once the posting dates have expired or you are preparing to make a selection. This will enable you to review pertinent job factors with ethnicity/gender applicants." (emphasis added.)

Such evidence, if uncontradicted, strongly suggests recruitment was not the sole activity affected by the AAP, and that once an applicant met the minimum requirements for a position, TEA employees considered race or gender in employment decisions. The magistrate judge himself found that "there is evidence that in the past, race and gender were a factor in selection of the successful applicant."[FN6] *Messer*, 936 F.Supp. at 1294.

FN6. The court also found that "there is no evidence that such is still the case at the present." The court cited no

portion of the record of evidence for this finding, however, and instead noted in a footnote to the assertion above: "Given that affirmative action has succeeded at this agency, the Court surmises that, under *Hopwood* and using strict scrutiny, any future use of race or gender as a factor in an actual hiring decision would be unconstitutional." The court's finding that discrimination had ceased, thus, was apparently mere speculation on the prospective effect of this court's decision in *Hopwood v. State of Texas*, 78 F.3d 932 (5th Cir.), *cert. denied*, __ U.S. __, 116 S.Ct. 2581, 135, L.Ed.2d 1095 (1996).

TEA's response to this evidence, apart from creating a fact issue on the precise application of the AAPs in employment decisions, is that even if there were some incidents of past discrimination, these were isolated anomalies and cannot be related to the individual harm of which Messer complains. The abundant evidence of underutilization notices, statements regarding affirmative action and minority hiring from the Division of Personnel and Staff Development, handwritten notes with TEA letterhead regarding the "parity" of various groups in hiring decisions, and correspondence from Commissioner Meno stating that TEA "continues to implement the goal of the State Board of Education to achieve a staff balanced both in ethnicity and gender and reflecting as nearly as possible the ethnic composition of the state as a whole," appear to depict an agency-wide consciousness of race and gender as grounds for employment decisions. At the very least, Messer has raised a material factual issue regarding whether she was discriminated against as a result of TEA's AAP in the specific instances of which she complains. The magistrate judge erred in finding that Messer failed to produce "any facts" that would show TEA's explanations for its personnel decisions

Messer also sought prospective injunctive relief and reinstatement with TEA. The magistrate judge found that Messer requested reinstatement only if she were to be promoted, and that

Messer was not entitled to this promotion; thus, the court held any prospective relief was moot. *Messer*, 936 F.Supp. at 1293. Messer points out, however, that her First Amended Complaint sought injunctive relief including, but not limited, to a promotion or a salary at the level of the four minority directors hired to positions similar to the one she held, or "any other equitable relief as the Court deems appropriate." Jurisdiction over claims for prospective relief "is appropriate only if a reasonable likelihood exists that the plaintiff will again be subjected to the allegedly unconstitutional actions." *Wallace v. Texas Tech Univ.*, 80 F.3d 1042, 1047 n. 3 (5th Cir.1996). This determination in turn depends on whether Messer can show she was discriminated against; thus, our remand of Messer's other claims necessarily calls into question whether she was entitled to a promotion or some other form of injunctive relief. On remand, should Messer successfully prove that she was discriminated against, the magistrate judge may then determine what remedies Messer is entitled to, prospective or otherwise.

Messer also argues the magistrate judge erred in dismissing her complaint that TEA retaliated against her for filing a discrimination charge. In order to support a retaliation claim under Title VII, Messer had the burden of establishing that: (1) she engaged in activity protected by Title VII; (2) an adverse employment action occurred; and (3) there was a causal connection between the participation in the protected activity and the adverse employment action. See *Dollis v. Rubin*, 77 F.3d 777, 781 (5th Cir.1995). Furthermore, "Title VII was designed to address ultimate employment decisions, not to address every decision made by employers that arguably might have some tangential effect upon those ultimate decisions." *Id.* at 781-82. Ultimate employment decisions include hiring, discharging, promoting, compensating, or granting leave, but not "events such as disciplinary filings, supervisor's reprimands, and even poor performance by the employee--anything which might jeopardize employment in the future." *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707-08 (5th Cir.1997).

On review, we agree that none of Messer's allegations of retaliation involves adverse personnel action. Although Messer alleged to the magistrate judge that TEA failed to resolve her internal grievance, closely monitored her conversations, criticized her work and conduct, did not listen to her input or allow her to represent TEA at certain functions, and downsized her department (as part of an agency-wide reduction), she did not allege an ultimate employment decision. On appeal, Messer asserts retaliation by TEA against other employees who criticized affirmative action or gave testimony in her lawsuit; this is not probative as to Messer. At best, Messer's allegations concern incidents that "might jeopardize employment in the future," but did not affect her in any ultimate sense.

CONCLUSION

For these reasons, the decision of the magistrate judge dismissing Messer's discrimination claims is REVERSED and REMANDED in part and AFFIRMED as regards the retaliation claim.

AFFIRMED IN PART; REVERSED and REMANDED IN PART.

REYNALDO G. GARZA, Circuit Judge, specially concurring:

I concur with the result reached by the majority in this matter. Messer's retaliation claim was properly dismissed, but the magistrate judge erred in dismissing Messer's discrimination claims. Therefore, this case is reversed and remanded in part and affirmed in part. However, I have certain reservations about the decision of the majority, and write separately to express those concerns.

Our fellow Circuit Judge, Judge Jacques Wiener, reminded us in his concurrence in *Hopwood v. State of Texas* that "we should

only decide the case before us, and should do so on the narrowest possible basis." *Hopwood v. State of Texas*, 78 F.3d 932, 962 (5th Cir.1996) (Wiener, J. concurring), *cert denied*, __ U.S. __, 116 S.Ct. 2581, 135 L.Ed.2d 1095 (1996). The majority is attempting to prove a bit too much in this case, with its rather sweeping dicta regarding the constitutionality and standards of review for affirmative action policies. In doing so, it appears to me that the majority is attempting to quietly expand Hopwood's empire into the realm of employment law with this decision, a move which is both hasty and unnecessary, given that the main issue is simply whether there is enough of a dispute of fact and law in this matter so as to preclude summary judgment. I am not persuaded that Supreme Court precedent or the precedent of this Circuit requires as sharp an assault on states affirmative action employment policies as the majority implies, nor do I see a particular need to add yet another burden to those who are trying to manage workplaces in this Circuit.

The majority appropriately cites *Wygant*, *Croson*, and *Adarand* as the three leading Supreme Court cases on this subject. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995). As these cases point out, the racial classifications imposed by government must be reviewed under strict scrutiny, such classifications "must serve a compelling government interest, and must be narrowly tailored to further that interest." *Adarand*, 515 U.S. at 227, 235, 115 S.Ct. at 2112-13, 2116-17. Racial classifications whose sole purpose is the creation or maintenance of diversity do not pass muster under this standard. *Id.* at 228, 115 S.Ct. at 2113. Similarly, affirmative action programs whose sole or primary purpose is the creation of minority "role models" do not pass muster under this standard. *Wygant*, 476 U.S. at 275, 106 S.Ct. at 1847-48. However, this strict scrutiny does not abolish all race- based distinctions, and such distinctions are acceptable if

necessary to further a compelling interest, and if the "narrow tailoring" test is satisfied. *Adarand*, 515 U.S. at 237, 115 S.Ct. at 2117. As Justice O'Connor stated, strict scrutiny is not "strict in theory, but fatal in fact." *Id.* Further, it should be noted that this case does not involve strict quotas (or quotas masked as "goals") as did *Adarand* and *Croson*.

Whether or not the TEA's policies pass muster is a matter to be decided upon remand. However, I fear that the tone of the majority's decision, coupled with its invocation of *Hopwood*, will send the message out that affirmative action is, for all intents and purposes, dead in the Fifth Circuit. Such an interpretation would be incorrect under Supreme Court precedent and the precedent of this Circuit, and I write separately to make that point clear.

During the course of our deliberations, I asked my fellow judges on this panel to wait until the Supreme Court made its decision in *Piscataway* before publishing an opinion in this case. *Taxman v. Bd. Of Educ. of Township of Piscataway*, 91 F.3d 1547 (3d Cir.1996), *cert. granted*, __ U.S. __, 117 S.Ct. 2506, 138 L.Ed.2d 1010 (1997). My colleagues chose not to do so, and I disagreed with this choice.

Today, as I write this concurrence, the latest news from Washington states that *Piscataway* is going to be settled. This does not change my disagreement with the majority's choice, in principle. While it is true that the basic facts of *Piscataway* differed from those of the case at bar, the basic issues were similar, namely, the extent to which, if at all, race and ethnicity may be considered in employment decisions made by the government. When *Piscataway* was still a live case, I thought my colleagues should have chosen to wait, so this Circuit would not only have had the benefit of the most current views of the Supreme Court on this subject, but we could also have used this case to help chart the post-*Piscataway* course in this field of law. I believe that this haste was unnecessary (Messer is at a new job,

so we need not be concerned that she is suffering at the hands of hostile employers), and indicative of the majority's desire to move quickly and quietly in expanding *Hopwood's* reach. At any rate, recent events make this point moot as a legal maner, but I think it is still worth commenting upon.

There is another issue regarding Supreme Court precedent. In recent years, the Supreme Court has been showing a stronger (and in my view, salutary) respect for states' rights. The Supreme Court, in decisions such as *U.S. v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995),[FN1] *Printz v. U.S.*, __ U.S. __, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997),[FN2] *City of Boerne v. Flores*, __ U.S. __, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997),[FN3] and *Washington v. Glucksberg*, __ U.S. __, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997),[FN4] among others,[FN5] has shown an increasing willingness to limit the power of the federal government and allow states to set their own rules and regulations on various matters.

FN1. In *Lopez*, the Supreme Court struck down the federal Gun-Free School Zones Act, which forbade the possession of a handgun within a school zone, stating that passage of this law exceeded Congress' authority under the Commerce Clause, because the activity in question was not economic activity that substantially affected interstate commerce, and therefore, passage of this law was an unconstitutional overreach on the part of the Congress.

FN2. In *Printz*, the Supreme Court struck down a section in a federal handgun control law, the Brady Law, which required local law enforcement agencies to perform background checks on gun purchasers. The Supreme Court held this requirement imposed an unconstitutional obligation on state and local law enforcement authorities to execute federal laws.

FN3. In *Boerne*, the Supreme Court struck down the federal Religious Freedom Restoration Act of 1993, as exceeding Congress' enforcement powers under § 5 of the Fourteenth Amendment, and constituted an unconstitutional interference with state and local regulations regarding zoning, health and safety, and other police power matters.

FN4. In *Glucksberg*, the Supreme Court did not create a right to die, but also did not forbid states from passing laws regarding assisted suicide, thereby leaving the issue of the right to die up to the states, unlike the issue of the right to abortion. See *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973).

FN5. Admittedly, the cases cited do not deal with affirmative action, but they are useful in demonstrating the federalist trend in Supreme Court jurisprudence.

This development has coincided with the Supreme Court's limitations on affirmative action, as exemplified in *Wygant*, *Croson*, and *Adarand*. These two trends, while independent, can conflict with one another. If a state, through the acts of its legislature, chooses to create certain affirmative action policies, the extent to which the federal courts can interpret and scrutinize such policies is both expanded by the recent precedents limiting affirmative action and contracted by the recent precedents limiting the power of the federal government (including the federal courts) from intervening in matters of state governance.

This federalist trend conflicts with an interventionist posture by the federal courts with regard to state affirmative action policies. This conflict has yet to be resolved, and I fear that an overly intrusive approach on our part will only confuse an already murky situation. Indeed, the Supreme Court's decision to deny certiorari in *Coalition for Economic Equity v. Wilson*, 110 F.3d

1431 (9th Cir.1996), *cert. denied.* __ U.S. __, 118 S.Ct. 397. 139 L.Ed.2d 310,[FN6] can be interpreted (to the extent that denials of certiorari can be interpreted) as a recognition that the Supreme Court is reluctant to create a national, "one size fits all" regulation on affirmative action, and is content to leave the details up to the states.

FN6. In this case, the Ninth Circuit held that Proposition 209, an anti-affirmative action referendum passed by a majority of the voters in California, did not violate the equal protection clause, and was not preempted by Title VII. The Supreme Court denied certiorari.

The policies at issue in the case at bar are based on decisions by the legislature, in its findings and regulations regarding the use of affirmative action policies in employment. These regulations, promulgated by a democratically elected legislature, deserve at least some degree of deference and respect.[FN7] I am concerned that the majority does not seem to give this point much thought in its analysis, and does not give enough respect to actions which were based on the decisions of the legislature. I am of the opinion that unless a state's actions are forbidden by restrictions in the text of the Constitution or the overwhelming weight of case law, the federal courts should not meddle into the internal affairs of the states. That is one of the main ideas underlying the Tenth Amendment, and the very nature of our federal system.

FN7. Further, the policies in question, however controversial, certainly do not deserve to be compared to the racial laws of Nazi Germany, as was done in a rather ridiculous paragraph in Messer's brief.

However, despite my reservations, I CONCUR with the decision of the panel in this case. Karen Messer will have her day in court.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-50605

KAREN HANSON MESSER
Plaintiff - Appellant

v.

LIONEL R. MENO, Individually and in His Official Capacity as the Texas Commissioner of Education; TEXAS EDUCATION AGENCY; MIKE MOSES
Defendants - Appellees

Appeal from the United States District Court for the Western District of Texas, Austin

ON SUGGESTION FOR REHEARING EN BANC
(Opinion December 11, 1997, 5 Cir., F.3d)

Before REYNALDO G. GARZA, HIGGINBOTHAM and JONES, Circuit Judges.

PER CURIAM:

Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED R. APP. P. and 5TH CIR. R. 35), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ EDITH H. JONES
United States Circuit Judge

APPENDIX C

Karen Hansen Messer,
Plaintiff
v.
Lionel R. Meno, in his former capacity
as the Texas Commissioner of Education,
the Texas Education Agency, and Mike Moses
as the Texas Commissioner of Education,
Defendants.

No. A-95-CA-165-SC

United States District Court
W.D. Texas - Austin Division

July 8, 1996.

White, female employee of state education agency brought gender and race discrimination action against the agency and its former as well as current commissioners. Agency and commissioners filed several motions for partial summary judgment. The District Court, Capelle, United States Magistrate Judge, held that: (1) state education agency was not "person" subject to liability for damages under §1983; (2) employee's §§ 1981 and 1983 discrimination claims were barred since they could only be brought under Title VII; (3) state education agency's affirmative action plan was facially constitutional; (4) employee's failure to mention promotion decision in her administrative charge required dismissal of her Title VII claim challenging such decision; (5) employee failed to create genuine issue of material fact regarding whether state education agency's proffered reason for denying her promotion was pretext for gender discrimination; (6) employee failed to create genuine issue of material fact regarding whether state education agency downsized her division in retaliation for her participation in protected activity; and (7)

state's sovereign immunity barred employee's breach of contract claim.

Motions granted.

Joseph P. Webber, Austin, Texas for Plaintiff

James C. Todd, Assistant Attorney General,
Austin Texas for all defendants.

MEMORANDUM OPINION

CAPELLE, United States Magistrate Judge.

Before the Court are the following partially dispositive [FN1] motions, responses, and replies:

> FN1. Counsel for Defendant represented at a hearing held in this matter that the partial dispositive motions, when added together, address all of the various causes of action in this case. After careful review, the Court agrees.

1. Defendants' First Motion for Partial Dismissal/Summary Judgment filed July 17, 1995 (Doc. # 17); Plaintiff's Response to Defendants' Motion and attached exhibits filed July 26, 1995 (Doc. # 20); Defendants' Reply in Support of Partial Summary Judgment filed August 23, 1996 (Doc. # 24);

2. Defendants' Second Motion, with Supporting Brief, for Partial Summary Judgment filed December 13, 1995 (Doc. *1285 # 33); Plaintiff's Response to Defendants' Second Motion for Summary Judgment filed December 21, 1995 (Doc. # 36); Defendants' Reply in Support of their Second Motion filed January 17, 1996 (Doc. # 39);

3. Defendants' Third Motion for Partial Summary Judgment filed May 10, 1996 (Doc. # 45); [FN2] Plaintiff's Response to Defendants' Third Motion for Summary Judgment filed March 8, 1996 (Doc. # 36); and Defendants' Reply filed March 13, 1996 (Doc. # 44).

FN2. Because this third motion exceeded ten (10) pages (as did both of the previous motions), under the Local Rules Defendants were required to obtain permission of the Court prior to the motion being filed. The motion and request to exceed page limits was submitted February 23, 1996. However, the Court did not grant permission to file the motion until May 10, 1996. The Court is aware that both parties repeatedly requested (and were granted) permission to exceed page limits. While the Court in general routinely grants motions to exceed page limits, the use of successive "partial" motions and requesting permission to exceed the page limits for each of the motions (as well as most of the responses and replies) is disfavored.

4. The Court also has before it the letter written by counsel for Defendants on March 20, 1996 with respect to the applicability of the Hopwood case to the facts of the case at bar, Defendants' Supplemental Authority filed June 4, 1996 (Doc. # 47), Plaintiff's Supplemental Authority in Opposition submitted June 26, 1996, [FN3] Defendants' Objections to Plaintiff's Supplemental Authority filed June 27, 1996 (Doc. # 50), and Plaintiffs Third Supplemental Affidavit filed June 27, 1996 (Doc. # 51), as well as the pleadings filed in this cause.

FN3. The Court granted permission to exceed the page limits for this pleading contemporaneous to the issuance of this Opinion.

I.
BACKGROUND

Plaintiff, Karen Hansen Messer, was employed at Defendant Texas Education Agency (tTEA") at the time this suit was filed in state court in January of 1995. [FN4] Defendants removed this case to federal court on February 23, 1995 based on federal question jurisdiction.

FN4. Plaintiff resigned from TEA on March 25, 1996, to accept a higher paid position at the Texas Employment Commmission. Plaintiff contends that she resigned because she felt retaliated against and believed her input was no longer valued or desired. Although Plaintiff has left TEA, she indicates that she would return if the Court ordered her promoted to the position of TEA Coordinator and she received a sizable raise.

Ms. Messer sues under 42 U.S.C. §§ 1981, 1983, and Title VII [FN5] for alleged race and sex discrimination at the TEA. [FN6] After removal, Plaintiff amended her Complaint to also asserts state law claims for breach of contract and claims for actual and punitive damages. [FN7] Because of the posture of this case, the Court construes the facts, if supported by any evidence, in favor of Plaintiff Messer.

FN5. Plaintiff's Original Complaint did not include Title VII causes of action because she had not yet obtained a right-to-sue letter. After her receipt of the right-to sue letter on July 28, 1995, Ms. Messer timely amended her Complaint to add Title VII discrimination and retaliation claims.

FN6. The Court notes that Plaintiff does not assert a claim for gender discrimination under 42 U.S.C. § 1981. Gender discrimination does not fall within the scope of § 1981.

See *Runyon v. McCrary*, 427 U.S. 160, 167, 96 S.Ct. 2586, 2593, 49 L.Ed.2d 415 (1976).

FN7. Although Plaintiff asserts that "other" TEA employees have also been deprived of their rights, this is not a class action. For that reason Plaintiff lacks standing to allege violations to employees other than herself.

In 1991, Defendant Lionel Meno was appointed Commissioner of the TEA. Commissioner Meno left TEA in March of 1995 and is sued in his official capacity as the former TEA Commissioner. [FN8]. Plaintiff also sues the Texas Education Agency. an agency of the State of Texas. There are no individual defendants in this action.

FN8. Under Federal Rule of Civil Procedure 25(d), Mike Moses, as successor Commissioner to Defendant Meno, should have been fully substituted for Defendant Meno and Defendant Meno should have been dropped as an official capacity defendant. The Court presumes that the present Commissioner, Mike Moses, is the only official capacity defendant for purposes of the availability of prospective injunctive relief.

Plaintiff was employed at TEA from 1978 through 1996 and "rose through the ranks" to her final position as Senior Director of the Budget Management Division, a position she held for six (6) years. At the time of the events giving rise to this suit, senior directors were paid approximately $60,000. The title of "Senior Director" indicates a person who manages one of the larger or more complex TEA divisions.

While at the TEA, Commissioner Meno was apparently committed both to affirmative action and to compliance with [then] Governor Ann Richards' directive that the employees at Texas agencies should, as much as possible, reflect the population

of Texas with respect to race, ethnicity, and gender. See, *e.g.*, Plaintiffs Exhibits 43-49. From the evidence submitted by Plaintiff, it is clear that an extensive amount of work was done over the years to create, maintain, and analyze documentation concerning the ethnic and gender makeup of TEA employees and applicants for employment. See Exhibits to Plaintiff's Response to Defendants' First Motion for Summary Judgment, passim.

In furtherance of his commitment to affirmative action, Commissioner Meno hired four new senior directors (who were all minorities) at salaries higher than the salary then paid to Plaintiff as a senior director. Commissioner Meno apparently was proud that his senior directors, both the ones he hired and ones already at TEA, were (at least at one time) all minorities and/or women.

It is uncontested that three of these new directors accepted pay cuts to work at the TEA, while one received a minimal raise. The evidence indicates (and Plaintiff does not dispute) that, at least based on their records, all of the new senior directors were qualified for the position. Plaintiff's assertion is based on her claim that she, too, was entitled to the higher salary and would have received it if she was a minority. Allegedly, after Ms. Messer complained about the salary disparity, Commissioner Meno promised Ms. Messer that her salary would be raised to equal that of the other directors. Although Ms. Messer eventually received a raise, she apparently was still earning approximately $1,000 less annually than some of the other directors.

There is substantial evidence indicating that affirmative action was, at least in the past, a factor not only in recruitment but also in TEA hiring decisions. See *e.g.*, Depositions of Susan Farias and Kristine Hopkins Mohajer Motlagh; see also Plaintiff's Exhibits 43-50, 65, 88, 140, 206. The TEA works under an annual "Affirmative Action Program" ("AAP") which stresses the importance of diversity. (Plaintiff's Exhibits 15-20). The 1993-94 AAP, and prior AAPs, had the stated goal of "achieving workforce

diversity consistent with the population." [FN9] See Plaintiff's Exhibit 20. The 1994-95 AAP alters this goal slightly by stating "the overall objective is to achieve a workforce balanced with a proportionate number of women and minorities in the workforce." See Plaintiff's Exhibit 21. The 1994-1995 AAP and prior AAPs also require that no person should be excluded on the basis of race, gender, age, etc. However, under the AAPs, monthly reports are to be created to "monitor utilization." The AAPs also all include extensive gender and ethnic breakdowns of the TEA workforce, both of the entire workforce and by category of position. TEA also forwards "utilization reports" to hiring managers indicating staffing compositions and "deficiencies" in staffing. See Plaintiff's Exhibit 237 attached to Plaintiff's Third Supplemental Affidavit.

FN9. Referred to herein as "parity staffing."

Purportedly because of the success of affirmative action at TEA, women comprise approximately sixty percent (60%) of TEA's work force. Plaintiff asserts that this overabundance of women results in discrimination against women because, to achieve parity of genders (as reflected in the population), hiring decisions may be made which disfavor women. Specifically, Plaintiff asserts that women have become an "over-utilized" gender at TEA and thus are less likely to be hired or promoted as compared to men as a result of the "swinging pendulum" of affirmative action.

With respect to her race claim, Plaintiff alleges that, because there are more whites at TEA than the average of the Texas population, whites are an "over-utilized" race and also are less likely to be hired or promoted. Plaintiff posits that as a white woman, she is "dually disadvantaged" when compared to a minority man.

Plaintiff alleges that she received less pay than minorities as a result of her gender and race. Plaintiff asserts that in January of 1992 she was not considered for the position of Coordinator because she was a white female (a position filled by Jim Johnson, a black male). Plaintiff also alleges that in December of 1993 (or January of 1994) she was not promoted to the position of "Coordinator of Internal Operations" because she was female (a white male, Bill Monroe, was the successful candidate). Plaintiff additionally asserts that there was a "climate of fear" at TEA in which supervisors were required to make hiring decisions on the basis of race or gender in order to achieve parity staffing regardless of who was best qualified for the position. Plaintiff asserts that as of February of 1996 (more than a year after suit was filed), supervisors were still encouraged to make employment decisions based on the applicant's race and/or gender. See Third Supplemental Affidavit of Karen Hanson Messer filed June 27, 1996 (Doc. # 51).

With respect to retaliation, Plaintiff asserts that TEA employees who testified favorably to her were either terminated or were subjected to retaliation and persuaded to quit their employment at the TEA. Plaintiff alleges that her opinions were no longer solicited or respected. Plaintiff also states that the division over which she had supervisory responsibility was reduced by twenty percent (20%) without a concomitant reduction in division responsibilities .

II.
THE MOTIONS, RESPONSES, AND REPLIES

A. The First Motion for Partial Dismissal or Partial Summary Judgment. [FN10]

FN10. Because the parties have submitted and the undersigned has considered materials outside of the pleadings, the undersigned treats the Motion to

Dismiss/Motions for Partial Summary Judgment as Motions for Partial Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Fed.R.Civ.P. 12(b)(6); *Young v. Biggers*, 938 F.2d 565, 568 (5th Cir.1991).

1. Defendants' Motion.

Defendants first move for partial summary judgment on the issue of the facial constitutionality of TEA's Affirmative Action Program. Defendants assert that because the relevant portions of the AAP encourage the provision of equal opportunity only through the expansion of the applicant pool and not at the point of the hiring decision, they are race and gender neutral. The AAP indicates that no selection techniques (hiring or promotion decisions) should be used that discriminate on the basis of race, religion, national origin, sex, disability, age, or veteran status. Defendants assert that, as federal contractors, they are required under Executive Order 11246, dated September 24, 1965 (as implemented in 41 C.F.R. part 60 et seq.) to have an acceptable affirmative action plan in place. For these reasons, Defendants allege that the AAP is thus facially constitutional.

Defendants continue that dismissal of Plaintiff's sex discrimination claim is appropriate. [FN11] Defendants allege that because she has not identified any legally cognizable injury, Ms. Messer has failed to state a claim with respect to sex discrimination. Last, Defendants allege that TEA is not subject to suit under 42 U.S.C. §§ 1981 or 1983 and those claims should be dismissed against it both because TEA is not a "person" under § 1983 and because of the bar of Eleventh Amendment immunity.

FN11. At the time of the filing of this motion, Plaintiff had not yet added her Title VII causes of action. After receiving her right to sue letter on July 28, 1995, Plaintiff timely filed her First Amended Complaint adding a Title

VII cause of action. (Doc. # 26).

2. Plaintiff's Response.

Plaintiff identifies a position she would have been appointed to in January of 1992 had she not been a white woman, specifically that of TEA Coordinator. Plaintiff proffers her lengthy affidavit and numerous depositions (in their entirety), as well as a large number of documents.

Plaintiff asserts that she can maintain her 42 U.S.C. §§ 1981 and 1983 causes of action against TEA for, at a minimum, prospective injunctive relief, citing *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). Plaintiff asserts that because the suit was brought in state court and removed by Defendants to federal court (thus allegedly waiving immunity), the Eleventh Amendment does not bar her claims.

Plaintiff continues that Defendant Meno is a "policymaker" whose official decisions subject TEA to liability under 42 U.S.C. § 1983. For support, Plaintiff cites precedent addressing the liability of counties and municipalities for the decisions of their policymakers.

With respect to the AAP, Plaintiff asserts that the Plan fails to satisfy the strict scrutiny required of affirmative action plans because the AAP was not designed to remedy past discrimination. Plaintiff alleges that the AAP fails to serve a compelling state interest and is not narrowly tailored to further that interest. As such, Plaintiff alleges the Plan, on its face, must fail.

3. Defendants' Reply.

Defendants reiterate that Plaintiff has not been the victim of discrimination under any AAP. Defendants state that because the AAP deals with underrepresentation of minorities and women, the

statistical underrepresentation of men does not trigger any compensatory measures. Defendants point out that as federal contractors, they are required to have an affirmative action plan. Defendants also allege that a state agency is not a "person" suable under 42 U.S.C. § 1983. Defendant reiterates that TEA encourages minority applications but selects the successful applicant based solely on merit. Defendants state that summary judgment is appropriate on the facial validity of the AAP because it is constitutional on its face.

B. The Second Motion for Partial Summary Judgment.

1. Defendants' Motion

Defendants next move for partial summary judgment on several issues. Defendants assert that Plaintiff's state law breach of contract claim is barred by Eleventh Amendment and state sovereign immunity. Defendants continue that the challenges for failure to promote Plaintiff in January, 1992 selection and December, 1993 are time-barred and Plaintiff's damages claims against TEA and the official capacity defendants under 42 U.S.C. §§ 1981 and 1983 cannot be maintained. Defendants claim that Plaintiff's claim for punitive damages are not recoverable in the present case and are not available even in breach of contract cases.

Defendants also assert that they had legitimate, non-discriminatory reasons for the selection of Bill Monroe and the hiring of the four minority directors at salaries higher than Plaintiff's. Defendants allege that because the affirmative action plan did not enter into any hiring or promotion decisions affecting Plaintiff, she has no standing to assert the AAP is discriminatory. Defendants also assert that because Plaintiff failed to include the 1992 promotion claim in her EEOC charge, the claim is barred. Last, Defendants claim protection under the "Safe Harbor" provisions of Title VII. Defendants proffer affidavits and depositions in support of the above contentions.

2. Plaintiff's Response.

Plaintiff begins by citing numerous cases (from circuits other than the Fifth Circuit) in which it was held that summary judgment is disfavored in employment discrimination cases. Plaintiff asserts that her failure to promote claims are not barred because they are part of a "continuing violation." Plaintiff alleges that because the affirmative action plan was not implemented to remedy the effects of past discrimination, under *Croson* and *Adarand Construction*, the Plan fails.

Plaintiff continues that even though the 1992 claim was not included in her EEOC charge, it is still not barred, because it was within the scope of the EEOC investigation. Plaintiff asserts that, with respect to her 1993 claim, she filed her charge within three hundred (300) days of her notice of the adverse action as required under Title VII.

Substantively, Plaintiff points to the statistical evidence, which she asserts establishes that minorities are "over-utilized" at every level of TEA. Plaintiff alleges that this evidence, combined with proffered anecdotal evidence, is sufficient to survive summary judgment.

3. Defendants' Reply.

Defendants assert that most of the evidence proffered by Plaintiff is inadmissible. [FN12] Defendants cite *Bodenheimer v. PPG Indus. Inc.*, 5 F.3d 955 (5th Cir.1993) for the proposition that summary judgment can be appropriate in employment cases. Defendants argue that Plaintiff has failed to show a continuing violation and thus her 1992 promotion claim is time-barred. Defendants assert that the AAP is constitutional because it, unlike the cases cited by Plaintiff, does not require that minorities and/or women receive preferences in hiring or promotion. Defendant analyze the statistics and assert that they negate Plaintiff's

allegations of agency-wide discrimination. Defendants conclude by stating that Plaintiff has failed to disprove Defendants' nondiscriminatory reasons and they are entitled to the Safe Harbor provisions of Title VII and the requirements of Executive Order 11246.

FN12. In two appendices, Defendants lodge specific objections to tbe recitations in Plaintiff's Affidavit.

Defendants summarize Plaintiff's discrimination claims as attacking the AAP at three levels: first, a facial attack; second, as applied to selection and promotion decisions agency-wide; and third, as applied against Plaintiff personally in promotion decisions. Defendants assert that the AAP is facially constitutional; Plaintiff lacks standing to challenge its application agency-wide; and Plaintiff has failed to rebut Defendants' non-discriminatory reasons for failing to promote her and failed to provide a nexus between the AAP and any promotion decision. As such, Defendants allege that summary judgment is proper.

C. The Third Motion for Partial Summary Judgment.

1. Defendants, in their final motion, move for summary judgment on Plaintiff's retaliation cause of action. Defendants assert that although Plaintiff's [former] department was downsized, this was the result of agency-wide reductions in force and not retaliation for any protected activity. Defendants submit that Plaintiff has suffered no adverse employment decision within the coverage of Title VII. Defendants allege that federal court is not the proper forum to "micromanage" the relatively minor complaints which comprise Plaintiff's allegations of retaliation. Defendants assert that the evidence establishes as a matter of law that Plaintiff deserved any disciplinary actions she may have received

2. Plaintiff's Response.

Plaintiff responds that the evidence raises a fact issue with respect to retaliation. Plaintiff proffers her own affidavit and the affidavits of two former TEA employees whose employment with TEA ended soon after they gave depositions in this case. Plaintiff also proffers the affidavit of TEA former employee Larry Dale Loiselle, former TEA Equal Opportunity Coordinator and author of Plaintiff's Exhibit 65. [FN13] Mr. Loiselle asserts that he was demoted and then reportedly terminated after he questioned the legality of the AAPs. Mr. Loiselle also asserts that the TEA workforce statistics establish that, far from discriminating against minorities, the TEA has favored minorities to the extent that they have become "grossly overutilized" in all categories at TEA, especially at the highest TEA levels.

FN13. Plaintiff's Exhibit 65 was written by Mr. Loiselle in November of 1991. The memo, which was sent to all hiring managers, states, in part, as follows:
[There is a] goal to ensure that the Agency's hiring and promotion practices produce a workforce that reflects the ethnic and gender diversity of the state's population. An EEO/AA utilization report will be provided to each division director indicating utilization of protected classes. If an underutilization exists in a particular protected class, every available means will be taken to eliminate this underutilization. (emphasis added) Attached to the memo is a summary of the accepted procedures for the hiring process. The Attachment states:

The Agency has in place an Affirmative Action Program and Plan for Equal Employment Opportunity. Managers should survey their staffing patterns, especially concerning race and sex, when vacancies occur. While persons must ultimately be employed in the basis of job-related criteria, the needs of the unit, which include balanced workforce

considerations, should have significant influence on employment decisions . . . It is not required that the most qualified applicant be hired, only that the person hired meet the minimum qualifications set for the position. However, be sure to have a rational basis for recommending an applicant with less qualifications than others. Credible reasons for your recommendation become absolutely critical if the person recommended belongs to an over-utilized race and/or gender by occupational category, by division, and by units within divisions. Although the Court finds this evidence supports Plaintiff's allegations, there is no factual evidence in the record that TEA has continued to follow this practice or that this practice adversely affected Plaintiff, nor is there evidence that Meno was ever aware of this memo. The superseding 1994-95 AAP clearly indicates that considerations such as those expressed above should not be included in the hiring decision.

3. Defendants' Reply.

Defendants reply that, with respect to the adverse actions allegedly suffered by the other TEA former employees, Plaintiff lacks standing to complain about those alleged actions. Defendants continue that Plaintiff has not suffered an "adverse employment action" sufficient to constitute "retaliation" under Title VII. Defendants allege that summary judgment on retaliation is proper because there are no disputed issues of material fact and Plaintiff has failed to carry her burden to rebut their proffered legitimate, non-discriminatory reasons for their actions. Defendants proffer an appendix objecting to the allegations contained in the affidavits submitted in Plaintiff's Response.

D. Supplemental Information.

1. Defendants' Supplemental Information.

Defendants proffer a letter brief analyzing this case in connection with the Fifth Circuit Court of Appeals' recent decision in *Hopwood v. State of Texas*, 78 F.3d 932 (5th Cir.1996), *cert. denied*, __ U.S. __, 116 S.Ct. 2581, 135 L.Ed.2d 1095 (1996). The Court is familiar with and has considered the holding in *Hopwood* in reaching its decision.

Defendants also submitted supplemental authority in support of summary judgment, citing cases released since the original motions were filed. The Court reviewed the cases cited by Defendants in connection with this Opinion. Last, on June 28, 1996, Defendants filed objections to Plaintiff's Third Supplemental Affidavit.

2. Plaintiff's Supplemental Information.

Plaintiff filed supplemental authority in opposition to Defendants' Motions on June 26, 1996. [FN14]Plaintiff proffers a copy of the *Hopwood* case and analyzes its holdings in light of the case at bar. The Court has considered Plaintiff's arguments in reaching its decision. The Court also reviewed Plaintiff's Third Supplemental Affidavit filed June 26, 1996.

FN14. Permission to file this more than ten page pleading was granted on July 1, 1996.

III.
STANDARDS OF REVIEW

A. Summary Judgment.

A Court will, on a motion for summary judgment, render

judgment if the evidence shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Singh v. Shoney's, Inc.*, 64 F.3d 217, 218 (5th Cir.1995); *Int'l Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257, 1263 (5th Cir.1991), *cert. denied*, 502 U.S. 1059, 112 S.Ct. 936, 117 L.Ed.2d 107 (1992).

In deciding whether to grant summary judgment, the Court views the evidence in the light most favorable to the party opposing summary judgment and indulges all reasonable inferences in favor of that party. The Fifth Circuit has concluded "[t]he standard of review is not merely whether there is a sufficient factual dispute to permit the case to go forward, but whether a rational trier of fact could find for the non-moving party based upon the evidence before the court." *James v. Sadler*, 909 F.2d 834, 837 (5th Cir.1990) (citing *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986)). In other words, the Court must decide whether Ms. Messer produced facts which, if believed, would lead a reasonable jury to conclude that it was more likely than not that she was not promoted (and received less salary than comparable minorities) because of her race and gender. *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989. 994 (5th Cir.1996) (en banc).

Once a movant has come forward with sufficient evidence to support summary judgment, the burden is on the non-movant to "go beyond the pleadings and designate specific facts in the record showing there is a genuine issue for trial." *Wallace v. Texas Tech University*, 80 F.3d 1042, 1047 (5th Cir.1996). "Neither conclusory allegations nor unsubstantiated assertions will satisfy the non- movant's burden." *Id.* "Guesswork and speculation simply cannot serve as a basis for sending a case to a jury." *Brown v. CSC Logic*, 82 F.3d 651, 658 (5th Cir.1996). To the extent facts are undisputed, a Court may resolve a case as a matter of law. *Blackwell v. Barton*, 34 F.3d 298, 301 (5th Cir.1994).

B. Racial Preferences.

Strict scrutiny is the proper standard for analysis of all racial classifications, whether imposed by a federal, state, or local actor. *Adarand Constructors, Inc. v. Pena*, __ U.S. __, 2112, 132 L.Ed.2d 158 (1995); *Hopwood v. State of Texas*, 78 F.3d 932, 940 (5th Cir.), *cert. denied*, __ U.S. __ , 116 S.Ct. 2581, 135 L.Ed.2d 1095 (1996). Under the strict scrutiny analysis, a court must ask two questions: (1) Does the racial classification serve a compelling government interest, and (2) is it narrowly tailored to the achievement of that goal? Adarand, __ U.S. at __ , __ 115 S.Ct. at 2111, 2117; *Hopwood*, 78 F.3d at 940. Was the *Adarand* Court emphasized, strict scrutiny ensures that wcourts will consistently give racial classifications . . . detailed examination both as to ends and as to means." *Adarand*, __ U.S. at __ , 115 S.Ct. at 2111, 2117; *Hopwood*, 78 F.3d at 940-41.

The *Adarand* Court did not, however, outlaw race- based distinctions. "If race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the 'narrow tailoring' test." *Adarand*, __ U.S. at __, 115 S.Ct. at 2117.

The *Hopwood* Court did not absolutely bar consideration of race in admissions to publicly funded universities. The Court indicated that the use of other factors (such as economic background) which might correlate with race was constitutional. However, the Court stated that using race as a proxy for an individualized analysis in the selection processes, even for the goal of achieving academic diversity, was improper. The Court concluded that the use of race in admissions to achieve "diversity" was not a compelling state interest. *Hopwood*, 78 F.3d at 94546. With respect to the foregoing, the Court is mindful of the strict scrutiny required of affirmative actions in the following analysis.

IV.
ANALYSIS

The Court has before it three separate motions for partial summary judgment. The Court believes the most effective way to fully address the issues is by means of Plaintiff's various causes of action.

A. Plaintiff's Causes of Action Under 42 U.S.C. §§ 1981 and 1983.

1. Plaintiff's Request for Damages.

To recover damages under 42 U.S.C. § 1983, a plaintiff must show that a person, acting under color of state law, deprived the plaintiff of his or her constitutional or federal rights. *Green v. State Bar of Texas*, 27 F.3d 1083, 1087 (5th Cir.1994); *Young v. Austin I.S.D.*, 885 F.Supp. 972, 975 (W.D.Tex.1995).

The Eleventh Amendment divests federal courts of jurisdiction to entertain suits directed against states. [FN15] *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 304, 110 S.Ct. 1868, 1871, 109 L.Ed.2d 264 (1990). The Eleventh Amendment may not be evaded by suing state agencies or state employees in their official capacity, because such an indirect pleading remains in essence a claim upon the state treasury. *Green*, 27 F.3d at 1087. It is well established that state agencies and their official capacity employees are not "persons" subject to liability for damages under 42 U.S.C. § 1983. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 70-71, 109 S.Ct. 2304, 2312, 105 L.Ed.2d 45 (1989). Because it is a state agency, TEA cannot be held liable under 42 U.S.C. § 1983. *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 304, 110 S.Ct. 1868. 1871. 109 L.Ed.2d 264 (1990).

FN15. On its face, the Eleventh Amendment shields the states from suits by non-citizens only, but the Supreme Court early on construed it in light of a broader notion of sovereign immunity implicit in our federal/state scheme so as to prohibit also suits against a state by its own citizens. However, as stated by the Fifth Circuit, "a gaping hole in the shield of sovereign immunity" is the doctrine of *Ex Parte Young*. This doctrine holds that acts by state officials which are contrary to federal law cannot have been authorized or ratified by the state; and suits seeking to enjoin such wrongful and unauthorized acts are not suits against the state and a federal court's injunction against such wrongful acts is not a judgment against the state itself. *Brennan v. Stewart*. 834 F.2d 1248, 1252 (5th Cir.1988)

Plaintiff's citation to cases invoking liability for policymakers for municipalities and counties is simply incorrect, because those cases deal with subsidiaries of the state, not the state itself. *See, e.g., Monell v. Department of Soc. Servs.*, 436 U.S. 658, 691, 98 S.Ct. 2018, 2036, 56 L.Ed.2d 611 (1978) (A municipality does not incur liability under § 1983 wunless action pursuant to official municipal policy of some nature caused a constitutional tort"); *Piotrowski v. City of Houston*, 51 F.3d 512, 517 (5th Cir.1995) Neither the United States Supreme Court nor the Fifth Circuit have ever held that arms of the state (such as TEA) are subject to suit under § 1983.

The only possible defendants for damages in a § 1983 suit are municipalities, counties, or individual capacity defendants who are "state actors." There are no individual capacity defendants in this suit. [FN161 Therefore, the Court finds that Plaintiff's causes of action for damages under 42 U.S.C. §§ 1981 and 1983 should be dismissed.

FN16. A defense of qualified immunity would be available to such a defendant. State actors are entitled to the defense of qualified immunity unless they violated clearly established rights of which a reasonable official would have known. *Hale v. Townley*, 45 F.3d 914, 917 (5th Cir.1995). The Fifth Circuit recognizes that "the denial of some meritorious claims is the direct product of the immunity doctrine, which weighed these losses when it struck the policy balance." *Wicks v. Mississippi State Employment Services*, 41 F.3d 991, 997 (5th Cir.), *cert. denied*, __ U.S. __, 115 S.Ct. 2555, 132 L.Ed.2d 809 (1995). There is no evidence in this case that either Commissioner violated clearly established law (at least as enunciated prior to *Hopwood*).

In the alternative, the undersigned finds that Plaintiff's claims under 42 U.S.C. §§ 1981 and 1983 are barred because the claims, which involve discrimination, are properly brought only under Title VII. *Jackson v. City of Atlanta, Texas*, 73 F.3d 60, 63 (5th Cir.1996), *cert. filed*, 64 U.S.L.W. 3823 (June 4, 1996). In *Jackson*, the Court stated:

> Congress intended for Title VII--with its own substantive requirements, procedural rules, and remedies--to be the exclusive means by which an employee may pursue a discrimination claim. Allowing a plaintiff to state a discrimination claim under § 1983 would enable him to sidestep the detailed and specific provisions of "Title VII." *Id.*

With respect to the § 1981 claim, § 1981 affords no greater protection than Title VII: the elements of substantive claims of employment discrimination are the same under both statutes. *Page v. United States Indus., Inc.*, 726 F.2d 1038, 1041 n. 2 (5th Cir.1984). The Fifth Circuit has stated that where the plaintiff has alleged violations of both Title VII and § 1981, the Court, as a

rule, will consider the claim under § 1981 only if violation of that statute can be made out on grounds different from those available under Title VII. *Johnston v. Harris County Flood Control Dist.*, 869 F.2d 1565, 1575 (5th Cir.1989), *cert. denied*, 493 U.S. 1019, 110 S.Ct. 718, 107 L.Ed.2d 738 (1990); *Rivera v. City of Wichita Falls*, 665 F.2d 531, 534 n. 4 (5th Cir.1982).

In the present case, Plaintiff has failed to identify any distinction between her §§ 1981 and 1983 claims and her Title VII claim. For the foregoing reasons, Plaintiff's claims for damages under 42 U.S.C. §§ 1981 and 1983 will be dismissed.

2. Plaintiff's Request for Injunctive Relief.

Pursuant to *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), the sole exception to Eleventh Amendment immunity for states and official capacity state defendants is prospective injunctive relief. *See Ganther v. Ingle*, 75 F.3d 207, 209-210 (5th Cir.1996); *Tonkawa Tribe of Oklahoma v. Richards*, 75 F.3d 1039, 1048 (5th Cir.1996); *Saahir v. Estelle*, 47 F.3d 758, 760-61 (5th Cir.1995). The essential ingredients of the *Ex Parte Young* doctrine are that a suit must be brought against individual persons in their official capacities as agents of the state and the relief sought must be declaratory or injunctive in nature and prospective in effect.

Plaintiff has left TEA. Although Plaintiff requests reinstatement, she adds a proviso that this reinstatement will be acceptable only if she is offered the position of coordinator and given a concomitant raise. Because this Court does not find that Plaintiff was entitled to the promotion, this possibility is not available. Because Plaintiff does not request merely reinstatement to her old position, prospective declaratory or injunctive relief in her favor is moot. *See Wallace v. Texas Tech*, 80 F.3d 1042, 1047 n. 3 (5th Cir.1996). [FN17] For that reason, Plaintiff's request for injunctive relief under § 1983 will be dismissed.

FN17. This Court notes that the *Wallace* Court undertook a balancing test for the plaintif s § 1981 and § 1983 claims as well as claims asserted under Title VII. However, in *Wallace*, the § 1981 and § 1983 claims arose from an alleged violation of the First Amendment separable from the claim for discrimination asserted under Title VII. In contrast, in the present case the identical conduct forms the alleged violation of § 1981, § 1983, and Title VII.

B. Plaintiff's Facial Challenge to the AAPs under Title VII.

The Supreme Court has determined th:at in certain circumstances, an employer may voluntarily establish an affirmative action plan without violating Title VII. *United Steelworkers v. Weber*, 443 U.S.193, 197, 99 S.Ct. 2721, 2724, 61 L.Ed.2d 480 (1979). Under *Weber*, an employer's voluntary affirmative action plan is not a violation of Title VII if (1) its purpose is similar to that of Title VII, namely to "break down old patterns" of discrimination; (2) the plan does not "unnecessarily trammel" the rights of those outside the group that it is designed to protect; and (3) it is designed to eliminate a manifest racial or sexual imbalance. *Id.* at 208, 99 S.Ct. at 2730; *Johnson v. Transportation Agency*, 480 U.S. 616, 628-31, 107 S.Ct. 1442, 1450-52, 94 L.Ed.2d 615 (1987).

The burden of establishing that an employer's voluntary affirmative action plan violates Title VII is on the plaintiff: Once a plaintiff establishes a prima facie case that race or sex has been taken into account in an employer's employment decision, the burden shifts to the employer to articulate a nondiscriminatory rationale for its decision. The existence of an affirmative action plan provides such a rationale. If such a plan is articulated as the basis for the employer's decision, the burden shifts to the plaintiff to prove that the employer's justification is pretextual and the plan is invalid. *Johnson*, 480 U.S. at 626, 107 S.Ct. at 1449.

The Court notes that the evidence indicates that the AAPs in the present case were not designed to correct past discrimination, [FN18] nor is there at present a manifest racial or sexual imbalance. However, affirmative action plans are still required for all federal contractors. As such, past discrimination and present imbalance carlnot be a requirement for constitutionality.

FN18. As Justice O'Connor observes in the context of an employment discrimination case:

The imposition of a requirement that public employers make findings that they have engaged in illegal discrimination before they engage in affirmative action programs would severely undermine public employers' incentive to meet voluntarily their civil rights obligations. This result would clearly be at odds with this Court's and Congress' consistent emphasis on the "value of voluntary efforts to further the objectives of the law." The value of voluntary compliance is doubly important when it is a public employer that acts, both because of the example its voluntary assumption of responsibility sets and because the remediation of governmental discrimination is of unique importance . . . This conclusion is consistent with our previous decisions recognizing the States' ability to take voluntary race-conscious action to achieve compliance with the law even in the absence of a specific finding of past discrimination. Indeed, our recognition of the responsible state actor's competency to take these steps is assumed in our recognition of the States' constitutional duty to take affirmative steps to eliminate the continuing effects of past unconstitutional discrimination. *Wygant v. Jackson Bd. of Education*, 476 U.S. 267, 290-91, 106 S.Ct. 1842, 1855-56, 90 L.Ed.2d 260 (1986) (citations omitted, emphasis in original).

After review of the most recent AAP (Plaintiff's Exhibit 21) and consideration of the AAP in light of recent precedent, including *Hopwood*, 78 F.3d at 932-962, the Court finds that, because the AAP focuses on recruitment of minorities for the applicant pool and expressly prohibits favoritism in the actual selection of the successful applicant, the AAP is facially constitutional. (See, *e.g.*, § I, § X(B), § XI, § XII).

While there is evidence that in the past, race and gender were a factor in selection of the successful applicant, there is no evidence that such is still the case at present. [FNI9] There is evidence that supervisors are encouraged to increase the diversity of the applicant pool. However, this encouragement does not rise to an unconstitutional level. As such, the Court finds that Plaintiff's facial challenge to the AAP must be dismissed.

FN19. Given that affirmative action has succeeded at this agency, the Court surmises that, under *Hopwood* and using strict scrutiny, any future use of race or gender as a factor in an actual hiring decision would be unconstitutional. The Court does not reach this issue, however, because "courts have a strong duty to avoid constitutional issues that need not be resolved in order to determine the rights of the parties to the case under consideration." *County Court of Ulster County v. Allen*, 442 U.S. 140, 154, 99 S.Ct. 2213, 2223, 60 L.Ed.2d 777 (1979); *United States v. Mendiola*, 42 F.3d 259, 260 n. 1 (5th Cir.1994).

The Court notes, however, that TEA's use of "utilization reports" is arguably coercive with respect to hiring decisions and, as such, implicates *Hopwood's* prohibitions. While the Court does not reach this issue, the Court is disturbed that the continued use of utilization reports may create gender or racial preferences in hiring decisions, which is clearly impermissible under Supreme Court precedent and under *Hopwood*.

C. Plaintiff's Challenge to the AAPs as Applied to Her

The shifting burdens analysis for Title VII claims is well known. *See e.g., St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981); *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); *Brown v. CSC Logic*, 82 F.3d 651, 654 (5th Cir.1996).

In order to make out a prima facie case of discrimination, a plaintiff must show (1) that she is a member of a protected group; (2) that she was qualified for the job that she held; (3) that she suffered adverse action; and (4) individuals outside her protected group did not suffer the adverse action. *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 992 (5th Cir.1996) (en banc); *Singh v. Shoney's, Inc.*, 64 F.3d 217, 219 (5th Cir.1995). Once the plaintiff establishes a prima facie case, the defendant bears the burden of producing evidence that its employment decision was based on a legitimate, nondiscriminatory reason. See *St. Mary's Honor Center*, 509 U.S. at S08-09, 113 S.Ct. at 2748 (By producing evidence, whether ultimately persuasive or not, of non-discriminatory reasons, petitioners sustained their burden of production). The burden then shifts back to the plaintiff to prove that the defendant "intentionally discriminated" against the plaintiff on the basis of a prohibited factor and that the reason proffered was a pretext for discrimination. *St. Mary's Honor Center*, 509 U.S. at 515-17, 113 S.Ct. at 2752-54; *Atkinson v. Denton Publi~hing Co.*, 84 F.3d 144, 149 (5th Cir.1996); *Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955. 957 (Sth Cir.1993).

A defendant is not required to prove the absence of a discriminatory motive. *Burdine*, 450 U.S. at 253-56, 101 S.Ct. at 1093-95. Rather, the plaintiff has "the ultimate burden of proving the critical element of discriminatory motive." *Ray v. Tandem Computers*, 63 F.3d 429, 433 (5th Cir.1995), *Int'l Brotherhood of*

Teamsters v. United States, 431 U.S. 324, 334 n. 15, 97 S.Ct. 1843, 1854 n. 15, 52 L.Ed.2d 396 (1977). "Title VII does not exist to punish poor management skills; rather it exists to eliminate certain types of bias in the workplace." *Ray v. Tandem*, 63 F.3d at 435 n. 19.

Plaintiff alleges that she encountered three separable adverse employment actions as a result of her race and gender, two related to lost promotions [FN20] and one related to her salary in comparison to minorities at the same level. These claims are addressed in turn as follows:

> FN20. Both promotion decisions occurred in late December of the relevant years and the promotions may not have actually occurred until January. This has caused some confusion as to the relevant dates. The Court refers to the first promotion as the "1992 promotion" because Plaintiff apparently did not became aware of it until January of 1992. Because the Plaintiff was aware of the December, 1993 promotion in December of 1993, the Court refers to the second promotion as the "1993 promotion."

1. The 1992 Promotion.

First, Plaintiff alleges that she was not considered for the new position of Coordinator in early 1992 because she was a white woman. Defendant asserts that this claim is barred because the only charge filed by Plaintiff was filed more than three hundred days after she had notice of the promotion and, regardless, the EEOC charge which she did file did not mention the 1992 promotion.

It is well established that compliance with the administrative review apparatus provided by Title VII is ordinarily a requisite for judicial review of a discrimination claim. *See Gottlieb v. Tulane*

University of Louisiana, 809 F.2d 278, 284 n. 8 (5th Cir.1987). It is required that a plaintiff file a charge of discrimination with the EEOC no more than three hundred days [FN21] after she knew of the adverse employment action. The three hundred day notification requirement is intended to promote the speedy, informal, nonjudicial resolution of the discrimination claims, and to preserve evidence and records relating to the alleged discriminatory action. *Love v. Pullman Co.*, 404 U.S. 522, 92 S.Ct. 616, 30 L.Ed.2d 679 (1972); *Edwards v. Kaiser Aluminum & Chemical Sales, Inc.*, 515 F.2d 1195 (5th Cir.1975).

> FN21. Texas is a "referral state" because of the co-existent potential to file a charge with the Texas Commission on Human Rights. As such, the deadline to file a charge with either the EEOC or the TCHR is extended from 180 to 300 days.

The operative date from which the 300 day period begins to run is the date of notice of adverse action. *Delaware State College v. Ricks*, 449 U.S. 250, 101 S.Ct. 498, 66 L.Ed.2d 431 (1980); *Clark v. Resistoflex Co. Div. of Unidynarrucs*, 854 F.2d 762 (Sth Cir.1988). Determination of when notice has been communicated to an employee is based on an objective standard, focusing upon when the employee knew, or reasonably should have known, that the decision to not hire him had been made. *See McWilliams v. Escambia*, 658 F.2d 326 (Sth Cir.1981).

In the present case, Plaintiff had notice of the first failure to promote her more than three hundred days before she filed her charge of discrimination. Although Plaintiff asserts a "continuing violation," there is no evidence connecting the two discrete employment decisions. Plaintiff has therefore failed to carry her burden to rebut Defendant's allegation that Plaintiff's 1992 promotion claim is time-barred.

In addition, Plaintiff does not specifically mention the 1992 promotion decision in her charge. A Title VII cause of action may be based, not only upon the specific complaints made by the employee's initial EEOC charge, but also upon any kind of discrimination like or related to the charge's allegations, limited only by the scope of the EEOC investigation that could reasonably be expected to grow out of the initial charges of discrimination. *Fine v. GAF Chemical Corp.*, 995 F.2d 576, 578 (5th Cir.1993). The Court does not believe that Plaintiff's charge of discrimination related to the 1993 promotion, on the facts of this case, could cause an investigation of an unrelated promotion decision made almost two years earlier.

For the foregoing reasons, the Court finds that dismissal of the claim related to the first promotion decision is proper.

2. The December, 1993 Promotion.

The Court has reviewed the evidence proffered by Plaintiff with respect to the filing of her EEOC complaint on the 1993 promotion decision and finds that, at a minimum, she has raised a fact issue with respect to the timeliness of the filing. For that reason, the Court analyzes the claim on the merits.

Based upon *St. Mary's Honor Center*, for Plaintiff to succeed on her race or gender discrimination claims, she must offer evidence both that she was the best-qualified candidate for the positions of assistant supervisor and supervisor and that her race or gender was the "real reason" she was not promoted. 509 U.S. at 515-16, 113 S.Ct. at 2752-53.

Assuming, without deciding, that Plaintiff has made her prima facie case, Defendants have proffered evidence that Bill Monroe, a white male, was the most qualified applicant. Contrary to Plaintiff's supposition [FN22] that different interview panels skewed the selection process against her, the evidence, even

viewed in the light most favorable to Plaintiff, clearly indicates that the same three-member panel (which included a female and a minority) interviewed all four finalists for the position. Because Mr. Monroe scored the highest in objective questioning, the panel recommended that Mr. Monroe be hired if his references "checked out." Because those references supported Mr. Monroe's selection, he was offered the position. Plaintiff has proffered no evidence to rebut Defendants' assertions.

> FN22. Plaintiff does not affirmatively aver that there were different interview panel, she merely "thinks" or "heard" that there were different panels. The evidence clearly shows otherwise.

Although Plaintiff alleges that Mr. Monroe was not in actuality as qualified as the evidence before the TEA indicated, that fact does not render his selection discriminatory. "The question is not whether the employer made an erroneous decision; it is whether the decision was made with discriminatory motive." *Mayberry v. Vought Aircraft Co.*, 55 F.3d 1086, 1090 (5th Cir.1995). Even viewed in the light most favorable to Plaintiff, there is no evidence that TEA's decision was motivated by gender discrimination.

The Court has reviewed the evidence before TEA as to Mr. Monroe's qualifications and finds that they were more than adequate to support Mr. Monroe's selection. Defendants have therefore provided specific reasons why Mr. Monroe was selected over Ms. Messer, and those reasons are not connected to Mr. Monroe's gender. Plaintiff has failed to provide any facts which might show that the nondiscriminatory reasons proffered by Defendants are pretexts for gender discrimination. For that reason, the Court finds that Plaintiff's cause of action related to the 1993 promotion should be dismissed.

3. The Disparity in Salaries.

Plaintiff also complains that four minority directors in identical positions as she received more compensation for comparable work. Defendants have responded that the senior directors were recruited from outside TEA and three off the four directors took significant pay cuts to come to work at TEA, while the fourth received a minimal raise. The Court has reviewed the applications and backgrounds of the minority senior directors and determines that, even viewed in the light most favorable to Plaintiff, these directors were qualified for their positions. As such, Defendants' argument that they needed to offer a higher salary to "lure" them to TEA is credible. Defendants assert, and Ms. Messer does not dispute, that TEA did not need to offer a higher salary to Ms. Messer because she was a long-time employee of TEA and thus did not need to be "lured" into coming to work at TEA as a senior director. The Court notes that the position of senior director was a promotion for Plaintiff and was not a "promotion" for at least three of the four minority directors.

Plaintiff has failed to offer any facts which might indicate that the minority directors' salaries were based, not on their accomplishments, but on their skin color. For that reason, the Court funds that Plaintiff's cause of action for the salary differential should be dismissed.

D. Plaintiff's Title VII Retaliation Cause of Action.

Section 704(a) of Title VII, 42 U.S.C. s 2000e-3(a), provides protection against retaliation for employees who oppose unlawful employment practices committed by an employer and for employees who participate in Title VII proceedings. [FN23] A showing of three elements is required in order to make out a prima facie case of retaliation: (1) the plaintiff engaged in activity protected by Title VII; (2) an adverse employment action occurred; and (3) there was a causal connection between the

participation in the protected activity and the adverse employment action. *Dollis v. Rubin*, 77 F.3d 777, 781 (5th Cir.1995); *Barrow v. New Orleans S.S. Ass'n*, 10 F.3d 292, 298 (5th Cir.1994); *Collins v. Bapbst Memorial Geriatric Center*, 937 F.2d 190, 192 (5th Cir.), *cert. denied*, 502 U.S. 1072, 112 S.Ct. 968, 117 L.Ed.2d 133 (1992).

> FN23. This section provides:
> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice and made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this Title.

> The Court agrees that Plaintiff engaged in protected activity. However, the Court finds that, with respect to most of Plaintiff's complaints and the requirement of "adverse employment action," Plaintiff fails to carry her burden. "Title VII was designed to address ultimate employment decisions, not to address every decision made by employers that arguably might have some tangential effect upon those ultimate decisions." *Dollis*, 77 F.3d at 781-82, citing *Page v. Bolger*, 645 F.2d 227, 233 (4th Cir.) (en banc) (noting that Title VII discrimination cases have focused upon ultimate employment decisions such as hiring, granting leave, discharging, promodng, and compensating), *cert. denied*, 454 U.S. 892, 102 S.Ct. 388, 70 L.Ed.2d 206 (1981).

In *Dollis*, the Fifth Circuit recently held that the Plaintiff's complaints were properly disposed of on summary judgment because they did not rise to the level of "ultimate employment decisions." *Id.* at 782. Although Ms. Dollis engaged in protected activity, the Court found that she was not fired, demoted, denied

leave, denied a promotion, or made the subject of any other employment decision as a result of her acdvity and thus summary judgment on her claims was appropriate. Even if a plaintiff receives a poor performance evaluation, in *Gustovich v. AT & T Communications, Inc.*, 972 F.2d 845, 847 (7th Cir.1992), the court held that "[there is nothing to complain about until a poor [performance] rating carries or directly portends a loss of job or pay." *Id.*, see also *Hopkins v Baltimore Gas & Elec. Co.*, 871 F.Supp. 822, 826 n. 5, 836 (D.Md.1994) (salary increases and benefits "were not adversely affected in any way by performance appraisal" that plaintiff believed was too low; he failed to show that appraisal or other employer conduct constituted reprisal for protected activity because none of the alleged retaliatory acts were "adverse employment actions.")

Similarly, in the case at bar, Plaintiff has failed to show that, other than for her downsizing claim, she suffered any adverse "ultimate employment decision." [FN24] As such, Plaintiff fails to carry her prima facie burden with respect to all but one of her retaliation claims. [FN25]

FN24. Indeed, Plaintiff received a raise after she engaged in protected activity.

FN25. The Court notes that although Plaintiff complains about the termination of other TEA employees, she has no standing to complain about alleged retaliation experienced by other TEA employees.

However, the Court finds that the allegation that Plaintiff's division was reduced twenty percent (20%) in retaliation arguably satisfies her prima facie burden. If a plaintiff satisfies her prima facie burden, a defendant must come forward with a non-discriminatory reason for its actions, which the plaintiff must then rebut to survive summary judgment. *Ray v. Iuka Special Mun. Separate Sch. Dist.*, 51 F.3d 1246, 1249 (5th Cir.1995).

Defendants have proffered a legitimate reason for the division's downsizing, specifically that TEA agency-wide was undergoing a significant decrease in size related to funding and the TEA budget. Plaintiff has failed to provide any evidence which might indicate that her division was singled out in retaliadon for her protected activity. As such, the Court finds that Plaindff has failed to rebut the legitimate, non-discriminatory reason proffered by Defendants.

For the foregoing reasons, the Court finds that Plaintiff's retaliation claims under Title VII should be dismissed.

E. Plaintiff's State Law Claims.

Plaintiff also amended her complaint after removal to add a pendent state law claim for breach of contract, related to the promise by Dr. Meno to raise her salary to that of the other (minority) directors. [FN26] Although Plaintiff did eventually receive a raise, she alleges that this raise was "too little, too late." Defendants respond that sovereign immunity bars Plaintiff s recovery for breach of contract, requiring dismissal of the claim.

FN26. Because of the posture of this case, the Court presumes that Dr. Meno did promise Ms. Messer a salary raise. The Court also assumes, arguendo, that this promise was a "contract."

"From the earliest days of statehood, under the doctrine of governmental immunity, persons aggrieved by an action of the State or of one of its agencies have been unable to sue the State without its permission." *Barcroft v. State of Texas*, 900 S.W.2d 370, 371 (Tex.App--Texarkana 1995, no writ), citing *Hosner v. De Young*, 1 Tex. 764, 769 (1847). That rule prevails today. *Liberty Mutual Ins. Co. v. Sharp*, 874 S.W.2d 736 (Tex.App.-- Austin 1994, writ denied); *Dillard v. Austin Indep. Sch. Dist.*, 806 S.W.2d 589, 592 (Tex.App.--Austin 1991, writ denied). Moreover,

the State is immune from suit without its consent, even if there is no dispute regarding its liability. *Green International, Inc. v. State*, 877 S.W.2d 428, 432 (Tex.App.-- Austin 1994, writ dism'd by agr.).

With respect to Plaintiff's specific claims, the State, including a state agency such as TEA, is not liable for breach of contract absent consent to suit. *Lowe v. Texas Tech Univ.*, 540 S.W.2d 297, 298 (Tex.1976); *Pickell v. Brooks*, 846 S.W.2d 421, 424-26 (Tex.App.--Austin 1992, w writ);- 93 (Tex. *Dillard v. Austin Indep. Sch. Dist.*, 806 S.W.2d 589, 592 App.--Austin 1991, writ denied); *Courtney v. University of Texas Sys.*, 806 S.W.2d 277, 284 (Tex.App.--Fort Worth 1991, writ denied). While the State waives its immunity from liability when it contracts, *Fristoe v. Blum*, 92 Tex. 76, 45 S.W. 998, 999 (1898), the State retains its immunity from suit. *W.D. Haden Co. v. Dodgen*, 158 Tex. 74, 308 S.W.2d 838, 842 (1958); *Alcorn v. Vaksman*, 877 S.W.2d 390, 403 (Tex.App.-- Houston list Dist.] 1994 en banc, writ denied); *State v. Elliott*, 212 S.W. 695, 698-701 (Tex.Civ.App.--Galveston 1919, writ ref'd). Recovery of money damages against the State without its consent in a "pure" contract case is not permitted. *Courtney*, 806 S.W.2d at 281-82.

The State may consent to suit by enacting a statute that waives immunity or by passing a legislative resolution. Absent an allegation that the State has consented to be sued, the trial court lacks jurisdiction over breach of contract claims. *Green*, 877 S.W.2d at 433.

Once a state consents, it is liable under contract law the same as anyone else. Here, the State never consented to be sued. It is uncontested that Plaintiff has not received permission from the state legislature to sue the state. As such, her state law claims against TEA and the official capacity defendants [FN27] must be dismissed.

FN27. When state officials are sued for acts they performed in their official capacities, as in the case at bar, the suit is against the state and state sovereign immunity applies. *Alcorn*, 877 S.W.2d at 403, citing *Director of the Department of Agriculture and Enviromnent v. Printing Indus. Ass'n*, 600 S.W.2d 264, 266, 270 (Tex. 1980).

V.
SUMMARY OF FINDINGS

The Court determines as follows:

1. Plaintiff's claims under 42 U.S.C. § 1981 should be dismissed as repetitive of the claims asserted under Title VII;

2. Plaintiff's claim for damages under 42 U.S.C. § 1983 should be dismissed based on sovereign immunity;

3. Plaintiff's claim for prospective injunctive relief under 42 U.S.C. § 1983 should be dismissed as moot;

4. Plaintiff's Title VII cause of action related to the 1992 promotion decision should be dismissed as time-barred and as not arising within the scope of the EEOC charge;

5. Plaintiff's Title VII cause of action related to the 1993 promotion decision should be dismissed because Plaintiff failed to rebut Defendants' legitimate, non-discriminatory reason;

6. Plaintiff's Title VII cause of action for retaliation (aside from the claim for reduction of her division) should be dismissed for failing to show a prima facie case of adverse employment action;

7. Plaintiff's Title VII cause of action for retaliation for reduction of her division should be dismissed for failing to rebut Defendants' legitimate, non-discriminatory reason; and

8. Plaintiff's state law claims of breach of contract should be dismissed because she has failed to surmount the State's immunity from suit.

VI.
CONCLUSION

As recited above, all of Plaintiff's claims have been dismissed pursuant to various rulings on the motions for summary judgment.

(2)

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SUPREME COURT, U.S.

No. 98-535

In The

Supreme Court of the United States

October Term, 1998

TEXAS EDUCATION AGENCY,

Petitioner,

vs.

KAREN HANSEN MESSER,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

The petition does not contain "A list of all parties to the proceeding in the court whose judgment is sought to be reviewed (unless the caption of the case contains the names of all the parties). . ." as required by Sup. Ct. R. 14.1.(b). The caption of the case is styled as follows in the petition: "*Texas Education Agency, Petitioner v. Karen Hansen Messer, Respondent.*" The cover of the petition erroneously refers to it being filed by "Counsel for Respondent."

An accurate list of all parties to the proceeding in the Fifth Circuit is as follows: Karen Hansen Messer (Plaintiff-Appellant below and Respondent here) (hereafter referred to as "Respondent" or Messer"); Lionel R. Meno ("Meno"), in his former official capacity as the Texas Commissioner of Education; Mike Moses ("Moses"), in his official capacity as the Texas Commissioner of Education; and the Texas Education Agency (Defendants-Appellees below; only one of whom, the Texas Education Agency, is expressly named as Petitioner here). In this regard, there is confusion because the caption of the petition refers to "Texas Education Agency, Petitioner [singular]" whereas the petition states, at page 1, in pertinent part, "The Attorney General of Texas, on behalf of petitioners [plural] herein, the Texas Education Agency and an [unnamed] official of the Texas Education Agency, respectfully petitions for writ of certiorari. . . ."

Since they are not named in either the style or the body of the petition, Messer submits that Meno and Moses are not parties to the petition. Accordingly, the opinion and judgment of the Fifth Circuit is now final and nonappealable as to both Meno and Moses.

The only "petitioner" named in either the style or the body of the petition is former Defendant/Appellee Texas Education

Agency ("TEA"). Accordingly, Messer submits that the only "petitioner" before this Court is Petitioner TEA.

Messer shall hereafter refer to the petitioner (and/or the petitioners in the event this Court should deem Meno and/or Moses to be petitioners), whether singular or plural, as "Petitioner" or "TEA."

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STATEMENT OF THE CASE

The petition seeks this Court's review of the Fifth Circuit's opinion reported at *Messer v. Meno*, 130 F.3d 130 (5th Cir. 1997) and reproduced at Appendix A to the petition ("App. A"). The Fifth Circuit's opinion affirmed, in part, and reversed and remanded, in part, the opinion of the District Court reported at *Messer v. Meno*, 936 F. Supp. 1280 (W.D. Tex. 1996) and reproduced at Appendix C to the petition ("App. C"). The suggestion for rehearing *en banc* was treated as a petition for panel rehearing. The petition for panel rehearing and the suggestion for rehearing *en banc* was denied by the Fifth Circuit in its opinion rendered December 11, 1997. Appendix B to the petition ("App. B").

On July 6, 1998, the Fifth Circuit issued its mandate returning the case to the District Court for trial. On July 8, 1998, TEA filed its motion to recall the Fifth Circuit's mandate and to stay the mandate pending petition for certiorari. By order filed July 13, 1998, the Fifth Circuit denied TEA's motion to recall the mandate and to stay the mandate pending petition for certiorari.

This case is presently pending in the District Court. "Defendants' [TEA's] Motion to Stay Proceeding Pending Petition for Certiorari" was filed in the District Court on July 17, 1998. The District Court's "Scheduling Order and Trial Setting" was signed on July 27, 1998. By "Order" signed September 16, 1998, the District Court denied "Defendants' [TEA's] Motion to Stay Proceeding Pending Petition for Certiorari." On September 24, 1998, "Defendants' [TEA's] Motion to Reconsider Stay of Proceedings Pending Petition for Certiorari" was filed in the District Court. On October 14, 1998, the District Court signed its "Order" granting the stay requested by "Defendants' [TEA's] Motion to Reconsider Stay of Proceedings Pending Petition for Certiorari."

A. The petition misstates the status of this case (which, in accordance with the mandate of the Fifth Circuit, has been remanded to and is presently pending in the District Court).

The Petition misstates the procedural history and current status of this case by omitting the following facts:

1. The Fifth Circuit's mandate (returning this case to the District Court) was issued on July 6, 1998;

2. "Appellees' [TEA's] Motion to Recall Mandate" was denied by "Order" of the Fifth Circuit filed July 13, 1998;

3. "Defendants' [TEA's] Motion to Stay Proceeding Pending Certiorari" filed in the District Court on July 17, 1998, was denied by "Order" of the District Court signed September 16, 1998; and

4. "[TEA's] Motion to Reconsider Stay of Proceeding Pending Petition for Certiorari" was filed in the District Court on September 26, 1998, and was granted by "Order" signed by the District Court on October 14, 1998.

In point of fact, the Fifth Circuit's mandate has been issued and this case has been remanded to, and is presently pending in, the District Court. This case is not in the Fifth Circuit. The petition's misstatement (by omission) of the status of this case is particularly important where, as here, the sole basis for invoking this Court's jurisdiction is 28 U.S.C. § 1254(1). Petition, p. 2. The aforesaid 28 U.S.C. § 1254(1) reads as follows:

> Cases *in the courts of appeals* may be reviewed by the Supreme Court by the following methods:

> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . .

(Emphasis added).

This is a case now pending in the District Court. This is not a case ". . . in the courts of appeals . . ." subject to review by writ of certiorari under 28 U.S.C. § 1254(1).

B. The petition misstates the constitutional provisions, statutes, and regulations involved in this case.

Sup. Ct. R. 14 ("Content of a Petition for a Writ of Certiorari") reads, in pertinent part, as follows:

> 1. A petition for a writ of certiorari shall contain in the order indicated: . . . (f) the constitutional provisions, treaties, statutes, ordinances, and regulations involved in the case, set out verbatim with appropriate citation. If the provisions involved are lengthy, their citation alone suffices at this point, and their pertinent text shall be set out in the appendix referred to in subparagraph 1(i).

At pages 2 and 3 of the petition (under the heading "CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED"), TEA purports to comply with the above quoted provision of Sup. Ct. R. 14. However, the petition fails to comply with the above quoted section 1(f) of Sup. Ct. R. 14 and misstates the constitutional provisions, statutes, and regulations involved in this case.

For example, this case clearly involves Title VII of the Civil Rights Act of 1964, as amended. 42 U.S.C. §§ 2000e-

2000e-17; 42 U.S.C. § 1981(a) (hereafter referred to collectively as "Title VII"). However, the petition refers only to two (2) provisions of Title VII: 42 U.S.C. § 2000e-2(a) and 42 U.S.C. § 2000e-12(b). To make matters worse, the petition misstates 42 U.S.C. § 2000e-2(a) by quoting only the language of subsection (1) while wholly ignoring the clearly applicable language of subsection (2).

Under 42 U.S.C. § 2000e-2(a)(2):

> It shall be an unlawful employment practice for an employer — . . . (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individuals race, color, religion, sex, or national origin.

This clearly applies to the TEA's unlawful classification of Messer as both an over-utilized race (white) and an over-utilized gender (female).

The petition fails to make any mention whatsoever of 42 U.S.C. § 2000e-2(j), which is directly applicable to this case, and which reads as follows:

> (j) Preferential treatment not to be granted on account of existing number or percentage imbalance
>
> Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter

> to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons or any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, *in comparison with the total number or percentage of persons of such race, color, religion, sex, or national original in any* community, *State*, section, or other area, *or in the available work force in any* community, *State*, section, or other area.

(Emphasis added).

In the present case, TEA, by means of the TEA Affirmative Action Plans ("AAPs"), hiring guidelines, and under-utilization notices, gave preferential treatment to TEA employees and prospective employees on the basis of race and gender on "account of an imbalance" perceived by the TEA (at the prodding of the State Board of Education) ". . .in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin. . ." in the state of Texas. Such conduct is *not* condoned by any interpretation of Title VII. 42 U.S.C. § 2000e-2(j).

The petition further violates § 1(f) of Sup. Ct. R. 14 by failing to refer to 42 U.S.C. § 2000e-2(m). 42 U.S.C. § 2000e-2(m) is clearly applicable to the TEA employment practices at issue and states:

> (m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices
>
> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was *a motivating factor* for any employment practice, *even though other factors also motivated the practice.*

(Emphasis added).

Similarly, the petition relies upon certain U.S. Department of Labor regulations requiring federal contractors to have affirmative action plans (petition, p. 4) in support of TEA's so-called "safe harbor" defense under Title VII. However, the petition omits any reference to the very part of those regulations that pertains to the TEA AAPs. More particularly, the petition wholly fails to make any reference whatsoever to 41 C.F.R. § 60-2.12 ("Establishment of Goals and Timetables.") which reads, in pertinent part, at subsection (g): "Goals, timetables, and affirmative action commitments must be designed *to correct any identifiable deficiencies.*" (Emphasis added). *See also* 41 C.F.R. § 60-2.12(h) which reads:

> *Where deficiencies exist* and where percentages are relevant in developing corrective action the contractor shall establish and set forth specific goals and timetables separately for minorities and women.

(Emphasis added).

The petition purportedly relies upon EEOC regulations pertaining to affirmative action plans. However, the petition

pointedly fails to make any reference whatsoever to 29 C.F.R. § 1608.4. The introductory paragraph of 29 C.F.R. § 1608.4 states:

> An affirmative action plan or program under this section shall contain three elements: a reasonable self analysis; a reasonable basis for concluding action is appropriate; and reasonable action.

The petition ignores the aforesaid three (3) elements necessary in any affirmative action plan. The petition also fails to mention the very EEOC regulation (29 C.F.R. § 1608.4(b)) which defines what is, in fact, a "reasonable basis" for concluding affirmative action appropriate. 29 C.F.R. § 1608.4(b).

The TEA AAPs, on their face, violate the very EEOC regulations which the petition fails to mention. See for example, 29 C.F.R. § 1608.4(c)(2) ("Standards of reasonable action.").

The key discriminatory provisions of the TEA AAPs were adopted by the TEA in direct response to the State Board of Education's goal of having TEA employees "mirror" the race and gender of the population of the state of Texas as a whole. It is disingenuous for TEA to argue that the TEA AAPs were developed to comply with EEOC regulations or other federal regulations.

The petition spends considerable effort (see petition, pp. 14-17) attempting to explain why the racial classifications in the TEA AAPs should not be judged under the "strict scrutiny" demanded by *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 115 S. Ct. 2097 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S. Ct. 706, 102 L. Ed. 2d 854 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 106 S. Ct. 1842, 90 L. Ed. 2d 260 (1986); and *Hopwood v. State of Tex.*, 78 F.3d

932 (5th Cir. 1996), *cert. denied*, 116 S. Ct. 2580 (1996). In fact, the very EEOC regulations ignored in the petition essentially mirror the "strict scrutiny" test. For example, they dictate that: "The race, sex and national origin conscious provisions of the [affirmative action] plan or program should be maintained only so long as is necessary to achieve these objectives" and that "goals and timetables should be reasonably related to such considerations as the effects of past discrimination, . . .". 29 C.F.R. § 1608.4(c)(2). *See also* 29 C.F.R. §§ 1608.4(b) and 1608.4(c)(2).

C. The petition misstates the facts.

The "Statement of the Case" set forth at pages 3-6 of the petition misstates the facts (*i.e.*, the summary judgment evidence before the Fifth Circuit). The petition's misstatement of the facts is abundantly clear when the petition's "Statement of the Case" is compared with the detailed recitation of facts painstakenly set out by the Fifth Circuit in its opinion. *Messer v. Meno*, 130 F.3d 130 (5th Cir. 1997); App. A, a1-a24.

Compare, for example, the misstatement of the TEA's Affirmative Action Plans ("AAPs") in the first full paragraph at page 4 of the petition with the accurate statement of the TEA's AAPs set forth by the Fifth Circuit. *See Messer v. Meno*, 130 F.3d at 133 and 137-39; App. A, a3; a13-a17. Also, compare the misstatement of the "TEA AAP 'Under-utilization Notices' " (*see Messer v. Meno*, 130 F.3d at 138-39) (incompletely referred to in the petition simply as "utilization notices") in the second paragraph at page 4 of the petition with the correct statement of the "TEA AAP 'Under-utilization Notices' " stated by the Fifth Circuit. *Messer v. Meno*, 130 F.3d at 138-39; App. A, a14-a16.

The Fifth Circuit specifically found that Messer's assertion ". . . that TEA systematically promoted employees based on

racial and gender criteria found in the utilization reports" was ". . . supported for summary judgment purposes with adequate evidence. . .". *Messer v. Meno*, 130 F.3d at 135; App. A, p. a8.

The Fifth Circuit noted:

> The magistrate judge also observed that not only were the AAPs implemented at TEA not designed to correct past discrimination, but there was presently no manifest racial or sexual imbalance.

Messer v. Meno, 130 F.3d at 136; App. A, a10. The Fifth Circuit further noted that ". . . both the scope of the AAP's and their impact on Messer's employment are subject to genuine dispute." *See Messer v. Meno*, 130 F.3d at 137; App. A, a10-a11.

The Fifth Circuit noted that the language of the TEA AAPs themselves and the U.S. census statistics cited therein ". . . obviously raises concern that the AAP on its face mandates an unconstitutional quota system." *Messer v. Meno*, 130 F.3d at 137, n.4; App. A, a11-a12, n.4. The Fifth Circuit further noted that Messer had presented evidence ". . .that the AAP was vigorously enforced to insure that TEA's workforce would resemble as closely as possible the state's racial and gender breakdown." *Messer v. Meno*, 130 F.3d at 137; App A, a13.

After citing detailed summary judgment evidence submitted by Messer, the Fifth Circuit concluded:

> Such evidence, if uncontradicted, strongly suggests recruitment was not the sole activity affected by the AAP, and that once an applicant met the minimum requirements for a position, TEA employees considered race or gender in employment decisions.

Messer v. Meno, 130 F.3d at 139; App. A, a16.

After detailing the summary judgment evidence which TEA either ignores or misstates or mischaracterizes (Petition, pp. 3-6), the Fifth Circuit concludes:

> TEA's response to this evidence, apart from creating a fact issue on the precise application of the AAPs in employment decisions, is that even if there were some incidents of past discrimination, these were isolated anomalies and cannot be related to the individual harm of which Messer complains. The abundant evidence of underutilization notices, statements regarding affirmative action and minority hiring from the division of Personnel and Staff Development, handwritten notes with TEA letterhead regarding the "parity" of various groups in hiring decisions, and correspondence from Commissioner Meno stating that TEA "continues to implement the goal of the State Board of Education to achieve a staff balanced both in ethnicity and gender and reflecting as nearly as possible the ethnic composition of the state as a whole", appear to depict an agency-wide consciousness of race and gender as grounds for employment decisions. *At the very least, Messer has raised a material factual issue regarding whether she was discriminated against as a result of TEA's AAP in the specific instances of which she complains.* The magistrate judge erred in finding that Messer failed to produce "any facts" that would show TEA's explanations for its personnel decisions.

See Messer v. Meno, 130 F.3d at 139; App. A, a17. (Emphasis added).

D. The petition misstates the Fifth Circuit's opinion.

The petition misstates the Fifth Circuit's opinion in a tortured attempt to convince this Court that the Fifth Circuit's opinion "... has dramatically changed the landscape in employment discrimination cases from what had previously appeared to exist." Petition, p. 7.

Among the more egregious misstatements of the Fifth Circuit's opinion (which misstatements are made without citation to the Fifth Circuit's opinion) are the following:

> The Fifth Circuit's reasoning creates an *irrebutable presumption* of discrimination based on the *existence* of an affirmative action plan *alone* and thereby imposes on non-minority plaintiffs complaining of "reverse" discrimination a *lighter burden* than is placed on minority plaintiffs under Title VII.

Petition, p. 8. (emphasis added).

> ... [T]he majority opinion treats the *existence* of the affirmative action plan as raising an *irrebuttable presumption* of discrimination against non-minorities, sufficient to *automatically refute* TEA's legitimate, non-discriminatory reasons and preclude summary judgment for TEA.

Petition, p. 8. (emphasis added).

> By its decision in Messer's case, the Fifth Circuit has created a *lighter standard* for non-minority plaintiffs to show pretext. Only by treating the *existence* of an affirmative action plan as giving rise

> to an *irrebuttable presumption* of discrimination could the majority *completely ignore* four uncontroverted facts: . . . .

Petition, p. 9. (emphasis added).

> The Fifth Circuit's ruling rests upon an *assumed connection* between an affirmative action plan and discrimination that does not necessarily (and in this case does not in fact) exist . . . For the majority, it was enough that Messer had evidence of affirmative action in the hiring of *other* employees.

Petition, p. 13. (emphasis added).

By making misstatements such as those quoted above, TEA would have this Court believe that the Fifth Circuit has opined, in essence, as follows: "TEA has an affirmative action plan of some kind; accordingly, it is irrebuttably presumed that Messer was discriminated against." The Fifth Circuit clearly rendered no such opinion. TEA's repeated misstatements to the effect that it did underscore the weakness of TEA's position.

Rather than attacking the opinion of the Fifth Circuit, TEA has instead elected to misstate and mischaracterize that opinion until it is unrecognizable. TEA seeks to elicit the interest of this Court by disingenuously transforming the Fifth Circuit's opinion into a "parody" of itself.

E. The petition simply ignores the undisputed findings of the District Court which support the Fifth Circuit's opinion.

TEA filed no cross-appeal of any portion of the District Court's opinion. *Messer v. Meno*, 936 F. Supp. 1280 (W.D. Tex. 1996); App. C.

The petition simply ignores the following undisputed factual findings by the District Court which support the Fifth Circuit's opinion:

> 1. From the evidence submitted by Plaintiff, it is clear that an extensive amount of work was done over the years to create, maintain, and analyze documentation concerning the ethnic and gender makeup of TEA employees and applicants for employment.

Messer v. Meno, 936 F. Supp. at 1286; App. C, a31.

> 2. In furtherance of his commitment to affirmative action, Commissioner Meno hired four new senior directors (who are all minorities) at salaried higher than the salary then paid to Plaintiff as a senior director.

Messer v. Meno, 936 F. Supp. at 1286; App. C, a31.

> 3. There is substantial evidence indicating that affirmative action was, at least in part, a factor not only in recruitment but also in TEA hiring decisions.

Messer v. Meno, 936 F. Supp. at 1286; App. C. a31.

> 4. The Court notes that the evidence indicates that the AAPs in the present case were not designed to correct past discrimination, [FN 18] nor is there at present a manifest racial or sexual imbalance.

Messer v. Meno, 936 F. Supp. at 1293; App. C, a49.

> 5. Given that affirmative action has succeeded at this agency, the court surmises that, under *Hopwood* and using strict scrutiny, any future use of race or gender as a factor in an actual hiring decision would be unconstitutional.

Messer v. Meno, 936 F. Supp. at 1293-94; App. C, a50, n.19.

> 6. The court notes, however, that TEA's use of "utilization reports" is arguably coercive with respect to hiring decisions and, as such, implicates *Hopwood's* prohibitions. While the court does not reach this issue, the court is disturbed at the continued use of utilization reports may create gender or racial preferences in hiring decisions, which is clearly impermissible under Supreme Court precedent and under *Hopwood*.

Messer v. Meno, 936 F. Supp. at 1294, n.19; App. C, a50.

REASONS FOR DENYING THE WRIT

The petition for writ of certiorari should be denied for the following reasons:

1. In accordance with the mandate of the Fifth Circuit, this case has been remanded to and is presently pending in the District Court. Accordingly, this is not a case ". . . in the courts of appeals . . ." subject to review by writ of certiorari under 28 U.S.C. § 1254(1) (*see* petition p. 2) and this Court has no jurisdiction to grant the writ. *See* foregoing part A.

2. The petition fails to comply with § 1(f) of Sup. Ct. R. 14 ("Content of the Petition for a Writ of Certiorari") because the petition misstates (by omission) ". . . the constitutional

provisions, treaties, statutes, ordinances, and regulations involved in the case, . . .". *See* foregoing part B.

3. The petition misstates the facts. *See* foregoing part C.

4. The petition misstates the Fifth Circuit's opinion. *See* foregoing part D.

5. The petition ignores the undisputed findings of the District Court which support the Fifth Circuit's opinion. *See* foregoing part E.

6. The Fifth Circuit expressly applied the evidentiary standard established by this Court in *St. Mary's Honor Center v. Hicks* in weighing the summary judgment evidence before it (*Messer v. Meno*, 130 F.3d at 137; App. A, a12) and TEA is disingenuous to assert otherwise. Petition pp. i; 7-10.

7. The Fifth Circuit did not treat the TEA AAP

> . . . as creating an irrebuttable presumption of discrimination and thereby imposing on non-minority plaintiffs complaining of "reverse" discrimination a lighter burden than is placed on minority plaintiffs under Title VII.

(Petition p. 7) and TEA's assertion that it did is a gross mischaracterization of the Fifth Circuit's opinion. The Fifth Circuit merely found that Messer's summary judgment evidence raised a "fact issue" (not an "irrebuttable presumption") that discrimination had, in fact, occurred. *Messer v. Meno*, 130 F.3d at 133; App. A, a2. *See* following part F.

8. TEA waived its right to assert that "The Fifth Circuit departed from the decisions of this Court in congressional intent

by evaluating a public employer's affirmative action plan under constitutional equal protection standards in a Title VII case" (petition p. 14) because TEA *cited* and *relied upon* the "constitutional equal protection standards" established by this Court in *Adarand*, *Croson*, and *Wygant* as the "Applicable legal standard" before the Fifth Circuit in Appellees' Brief pp. 26-28. *See* following part G.

9. The Fifth Circuit has not "departed from the decisions of this Court" as TEA asserts (petition p. 14) but has, instead, clearly relied upon the opinions of this Court in *Adarand*, *Croson*, and *Wygant*. *See* following part H.

10. The question asserted by TEA is not "important" (petition, pp. 17-18) because, whether one follows the "equal protection standards for affirmative action" set forth by this Court in *Adarand*, *Croson*, and *Wygant*, or whether one follows the Title VII standards for affirmative action set forth by this Court in *Weber* and *Johnson*, the TEA AAP flunks both tests. See following part I.

The petition states three (3) reasons for granting the petition. Petition, pp. 7, 14, and 17.

The first stated reason for granting the petition is as follows:

> I. The Fifth Circuit's decision conflicts sharply with the standards enunciated by this Court by treating an affirmative action plan as creating an irrebuttable presumption of discrimination and thereby imposing on non-minority plaintiffs complaining of 'reverse' discrimination a lighter burden than is place on minority plaintiffs under Title VII.

Petition, p. 7.

F. The Fifth Circuit did not treat the TEA AAP "as creating an irrebuttable presumption of discrimination."

TEA's assertion that the Fifth Circuit treated the TEA AAP "as creating an irrebuttable presumption of discrimination" thereby placing "a lighter burden" on non-minority plaintiffs than on minority plaintiffs under Title VII constitutes a gross mischaracterization of the Fifth Circuit's opinion and is wholly unsupported by the evidence. If, as asserted by TEA, the Fifth Circuit treated the TEA AAP "as creating an irrebuttable presumption of discrimination" then why did the Fifth Circuit remand the case to the District Court for the trier of fact to determine the "disputed facts"? Nowhere in its opinion does the Fifth Circuit conclude or hold that the existence of the TEA AAP creates "an irrebuttable presumption of discrimination". The Fifth Circuit merely found that Messer's summary judgment evidence raised a "fact issue" (not an "irrebuttable presumption") that discrimination had, in fact, occurred. *Messer v. Meno*, 130 F.3d at 133; App. A, a2. ("*We find genuine issues of material fact*; TEA's favorable summary judgment is, for the most part, reversed and the case remanded.") (Emphasis added).

TEA's assertion that the Fifth Circuit's opinion imposed a "lighter burden" upon "non-minority plaintiffs" than upon "minority plaintiffs" under Title VII also mischaracterizes the Fifth Circuit's opinion and is not supported by the summary judgment evidence. More particularly, the summary judgment evidence establishes that, during the particular time at issue in this case, Messer was both an "over-utilized" race (white) as well as an "over-utilized" gender (female). However, either the vagaries of the decennial census or the specific gender/racial makeup of the particular TEA division making the hiring or promotion decision, can result in the "over-utilized" gender being male and the "over-utilized" race being Hispanic or Black.

The Fifth Circuit cites nine (9) portions of the record as being "among" the "many portions of the record [cited by Messer] to substantiate the discriminatory impact of TEA's affirmative action policy." *Messer v. Meno*, 130 F.3d at 137; App. A, a13. Only the first of these nine (9) pieces of evidence consists of the TEA AAPs. *Messer v. Meno*, 130 F.3d at 137-39; App. A, a13-a16. Among the additional evidence cited by the Fifth Circuit are TEA reports, letters, recruitment and hiring guidelines, "under-utilization notices", handwritten notes, etc. *Messer v. Meno*, 130 F.3d at 137-39; App. A, a13-a16.

The Firth Circuit's opinion does not purport to cite all of the summary judgment evidence in support of Messer's position. However, the evidence cited refutes the allegations asserted by TEA in the petition.

It is equally clear that the Fifth Circuit used the appropriate evidentiary test (*i.e.*, *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993)) in weighing the summary judgment evidence before it. *Messer v. Meno*, 130 F.3d at 137; App. A, a12. TEA is disingenuous to assert otherwise. Petition, pp. 7-10.

Can TEA obtain a writ of certiorari by asserting that the Fifth Circuit erred by applying the very evidentiary test (*St. Mary's Honor Center v. Hicks*, *supra*) which TEA had asked the Fifth Circuit to apply to the facts of this case? Common sense dictates the answer: No.

The second stated reason for granting the writ is as follows:

> II. The Fifth Circuit departed from the decisions of this Court and congressional intent by evaluating a public employer's affirmative action plan under

> constitutional equal protection standards in a Title VII case.

Petition, p. 14.

G. TEA's position is contrary to the position taken by TEA before the Fifth Circuit.

In its brief filed in the Fifth Circuit, TEA pointedly did *not* assert that the District Court erred in subjecting the TEA AAPs to the "close scrutiny" mandated by this Court in *Adarand*, *Croson*, and *Wygant*. In fact, TEA *cited* and *relied upon* *Adarand*, *Croson*, and *Wygant* as the "Applicable legal standard" before the Fifth Circuit. Brief of Appellees ("Appellees' Brief"), pp. 26-28. Although discussed under a separate subheading ("*Hopwood v. State of Texas*") of Appellees' Brief (at pp. 28-29), it is clear that TEA considered *Hopwood* to be part of the "Applicable legal standard" in this case. Appellees' Brief, pp. 26-33.

After acknowledging that *Adarand*, *Croson*, and *Wygant*, and also *Hopwood*, are the "Applicable legal standard" in this case (Appellees' Brief, pp. 26-31), TEA asserted compliance with that "Applicable legal standard" in a section of Appellees' Brief entitled "Compliance with *Croson/Adarand/Hopwood*." Appellees' Brief, pp. 31-33.

TEA is now asserting:

> The Fifth Circuit departed from the decisions of this Court and congressional intent by evaluating a public employer's affirmative action plan under constitutional equal protection standards in a Title VII case.

Petition, p. 14. However, *prior* to entry of the Fifth Circuit's opinion, TEA acknowledged and judicially admitted in its brief filed in the Fifth Circuit that *Adarand*, *Croson*, *Wygant*, and *Hopwood* were the "Applicable legal standard" by which the TEA AAPs must be judged. Appellees' Brief, pp. 26-31. *Prior* to the Fifth Circuit's opinion, TEA asserted "Compliance with *Croson/Adarand/Hopwood*" (Appellees' Brief, p. 31) which TEA candidly acknowledged was the "Applicable legal standard" (Appellees' Brief, p. 26).

The Fifth Circuit properly applied the "Applicable legal standard" which TEA insisted be applied to this Title VII case. Appellees' Brief, pp. 26-31. In doing so, the Fifth Circuit correctly determined that the summary judgment evidence raised fact issues which preluded the judicial finding of "Compliance with *Croson/Adarand/Hopwood*" (Appellees' Brief, p. 31) sought by TEA.

The Fifth Circuit's opinion provided a detailed analysis of merely a portion of the "many portions of the record" which substantiated "the discriminatory impact of the TEA's affirmative action policy." *Messer v. Meno*, 130 F.3d at 137-39; App. A, a13-a16. It is clear from the Fifth Circuit's extensive review of only a portion of the summary judgment evidence that the TEA AAP was certainly *not* in "Compliance with *Croson/Adarand/Hopwood*" which TEA had acknowledged was the "Applicable legal standard."

Faced with a detailed and well-reasoned Fifth Circuit opinion, TEA has taken a bold and unprecedented step before this Court. TEA has burdened this Court with a petition for writ of certiorari in which TEA asserts that the Fifth Circuit *erred* by applying the very "Applicable legal standard" (*i.e.*, "Compliance with *Croson/Adarand/Hopwood*") which TEA had *told* the Fifth Circuit to apply. Appellees' Brief, pp. 26-33.

TEA has filed an ill-advised petition based largely (and improperly) upon issues never raised by TEA before the Fifth Circuit rendered its opinion and, in fact, directly *contrary* to the position taken by TEA before the opinion now complained of was entered. As stated by the Fifth Circuit:

> We have held repeatedly that we will not consider issues not briefed by the parties. *See Webb v. Investacorp, Inc.*, 89 F.3d 252, 257 n.2 (5th Cir. 1996) ("an appellant abandons all issues not raised and argued in its initial brief on appeal.") (quoting *Cinel v. Connick*, 15 F.3d 1338, 1345 (5th Cir. 1994); *McKethan v. Texas Farm Bureau*, 996 F.2d 734, 739 n.9 (5th Cir. 1993) (failure to sufficiently brief issue constitutes waiver of issue).

Johnson v. Sawyer, 120 F.3d 1307, 1315-16 (5th Cir. 1997).

TEA has clearly *waived* its right to complain of the Fifth Circuit's application of a legal standard which TEA acknowledged before that Court was the "Applicable legal standard."

H. The Fifth Circuit has not "departed from the decisions of this Court" as TEA asserts.

In writing the majority opinion for the Fifth Circuit, Circuit Judge Jones clearly relied upon the following three (3) key opinions of this Court: *Adarand Constructions, Inc. v. Pena* ("*Adarand*"), 515 U.S. 200, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995); *City of Richmond v. J.A. Croson Co.* ("*Croson*"), 488 U.S. 469, 109 S. Ct. 706, 102 L. Ed. 2d 854 (1989); and *Wygant v. Jackson Bd. of Educ.* ("*Wygant*"), 476 U.S. 267, 106 S. Ct. 1842, 90 L. Ed. 2d 260 (1986). *Messer v. Meno*, 130 F.3d at 135-36; App. A, a9-a10. In his specially concurring opinion,

Circuit Judge Garza concurred with the result reached by the majority and acknowledged: "The majority appropriately cites *Wygant*, *Croson*, and *Adarand* as the three (3) leading Supreme Court cases on this subject. [citations omitted]." *Messer v. Meno*, 130 F.3d at 141; App. A, a20-a21. Judge Garza also refers to "[T]he Supreme Court's limitations on affirmative action, as exemplified in *Wygant*, *Croson*, and *Adarand*." *Messer v. Meno*, 130 F.3d at 142; App. A, a23. The Fifth Circuit also cited *Adarand*, *Croson*, and *Wygant* when it held, in *Hopwood*:

> Furthermore, there is now absolutely no doubt that courts are to employ strict scrutiny when evaluating all racial classifications, including those characterized by their proponents as "benign" or "remedial".

Hopwood v. State of Tex. ("*Hopwood*"), 78 F.3d 932, 940 (5th Cir. 1996), *cert. denied*, 116 S. Ct. 2581 (1996).

The Fifth Circuit's opinions in both *Hopwood* and below rested squarely on the shoulders of this Court's opinions in *Adarand*, *Croson*, and *Wygant*. In both *Hopwood* and the opinion below, the Fifth Circuit correctly held that the "strict scrutiny" test set forth in *Adarand*, *Croson*, and *Wygant* clearly applied to the affirmative action plans (AAPs) at both the University of Texas School of Law and the TEA. Although citing *Hopwood* in addition to *Adarand*, *Croson*, and *Wygant*, the Fifth Circuit clearly relied not upon *Hopwood* but upon the authority of this Court set forth in *Adarand*, *Croson*, and *Wygant*.

The Fifth Circuit's reliance upon Supreme Court precedent (rather than *Hopwood*) is illustrated by the following portion of the specially concurring opinion of Circuit Judge Garza:

> During the course of our deliberations, I asked my fellow judges on this panel to wait until the Supreme Court made its decision in *Piscataway* before publishing an opinion in this case. *Taxman v. Bd. of Educ. of Township of Piscataway*, 91 F.3d 1547 (3rd Cir. 1996), cert. granted __ U.S. __, 117 S. Ct. 2506, 138 L. Ed. 2d 1010 (1997). My colleagues chose not to do so, and I disagreed with this choice.

Messer v. Meno, 130 F.3d at 141; App. A, a21.

The third stated reason for granting the writ is as follows:

> "III. The question presented is important." Petition, p. 17.

I. The question presented is not "important" as asserted by TEA.

At pages 17 and 18 of the petition, TEA asserts, in pertinent part: "Whether Title VII incorporated equal protection standards for affirmative action is a matter of more than academic importance to state agency employers."

As noted previously, the TEA itself, in its brief before the Fifth Circuit, acknowledged and asserted that the "equal protection standards for affirmative action" (*i.e.*, those standards set by this Court in *Adarand*, *Croson*, and *Wygant* and applied by the Fifth Circuit in *Hopwood*) constituted the "Applicable legal standard" (Appellees' Brief, p. 26). TEA also expressly asserted "Compliance with *Croson/Adarand/Hopwood*" (Appellees' Brief, p. 31).

As noted earlier, TEA has clearly waived any right to argue against the incorporation of those very "equal protection

standards for affirmative action" which the TEA argued in its brief before the Fifth Circuit were applicable and which standards the TEA likewise argued in its brief before the Fifth Circuit the TEA AAPs met. Where, as here, an issue has been waived as a matter of law, it clearly cannot be deemed "important."

EEOC regulations have essentially adopted the "equal protection standards for affirmative action" set forth so clearly by this Court in *Adarand*, *Croson*, and *Wygant* and followed by the Fifth Circuit in *Hopwood*. See for example, 41 C.F.R. § 60-2.12 and 29 C.F.R. § 1608.4. As noted earlier, these clearly applicable EEOC regulations were ignored by TEA in the petition. In point of fact, the TEA AAP not only violates "equal protection standards for affirmative action," it also clearly violates Title VII itself (*e.g.*, 42 U.S.C. § 2000e-2(a)(1) and (2) and 42 U.S.C. § 2000e-2(j)) as well as applicable EEOC regulations specifically pertaining to affirmative action plans (*e.g.*, 41 C.F.R. § 60-2.12 and 29 C.F.R. § 1608.4).

The TEA AAP clearly violates the Title VII standards for affirmative action set forth by this Court in *Johnson v. Transportation Agency*, 480 U.S. 616, 637, 640, 107 S. Ct. 1442, 94 L. Ed. 2d 615 (1987) (where, unlike the TEA AAP, this Court reviewed ". . .an affirmative action plan designed to eliminate Agency work force imbalances in traditionally segregated job categories." and then found that ". . .there is ample assurance that the Agency does not seek to use its Plan to maintain a permanent racial and sexual balance."); and *Steelworkers v. Weber*, 443 U.S. 193, 208, 99 S. Ct. 2721, 61 L. Ed. 2d 480 (1979) (where, unlike the TEA AAP, "[T]he plan is a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance.").

In *Johnson v. Transportation Agency*, *supra* at 632, Justice Brennan noted: "[W]e do not regard as *identical* the constraints

of Title VII and the Federal Constitution on voluntarily adopted affirmative action plans." (Emphasis added). However, a comparison of the constitutional constraints set forth in *Adarand*, *Croson*, and *Wygant* with the Title VII constraints set forth in *Johnson* and *Weber* shows them to be, if not "identical", at least substantially the same.

As stated by Justice O'Connor (concurring in the judgment) in *Johnson*, *supra* at 649:

> In my view, the proper initial inquiry in evaluating the legality of an affirmative action plan by a public employer under Title VII is no different from that required by the Equal Protection Clause. In either case, consistent with the congressional intent to provide some measure of protection to the interests of the employer's nonminority employees, the employer must have had a firm basis for believing that remedial action was required.

Justice O'Connor concludes:

> Because both Wygant and Weber attempt to reconcile the same competing concerns, I see little justification for the adoption of different standards for affirmative action under Title VII and the Equal Protection Clause.

Johnson, *supra* at 651.

In any event, the TEA AAP flunks both the constitutional (*Adarand*, *Croson*, and *Wygant*) test and the Title VII (*Weber* and *Johnson*) test for affirmative action plans. See for example, the following undisputed factual findings of the District Court:

> The Court notes that the evidence indicates that the AAPs in the present case were not designed to correct past discrimination, [FN 18] nor is there at present a manifest racial or sexual imbalance.

Messer v. Meno, 936 F. Supp. at 1293, App. C, a49.

CONCLUSION

For the reasons given above, the petition should be denied.

Respectfully submitted,

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No. 98-535

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

TEXAS EDUCATION AGENCY,
Petitioner,

v.

KAREN HANSEN MESSER,
Respondent.

On Petition For Writ of Certiorari to the
United States Court of Appeals
For the Fifth Circuit

PETITIONER'S REPLY BRIEF

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No. 98-535

IN THE
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OCTOBER TERM, 1998

TEXAS EDUCATION AGENCY,
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KAREN HANSEN MESSER,
Respondent.

On Petition For Writ of Certiorari to the
United States Court of Appeals
For the Fifth Circuit

PETITIONER'S REPLY BRIEF

I. This Court Has Jurisdiction Over The Petition For Certiorari.

Respondent Messer argues in her Brief in Opposition at 2-3 that because the mandate has been returned to the district court, the case is no longer "in the court of appeals" for purposes of 28 U.S.C. § 1254(1), and therefore "is not a case . . . subject to review by writ of certiorari . . ." That argument is specious. "[I]t is clear that issuance of the court of appeals mandate does not defeat the right to petition for certiorari on the ground that the case is no longer in the court of appeals." 17 WRIGHT, MILLER & COOPER, FEDERAL PRACTICE & PROCEDURE, JURISDICTION 2d § 4036 at 19 & n. 26 (1988) (citing cases). *See also, United States v. Villamonte-Marquez*, 462 U.S. 579, 580 n.2, 103 S. Ct. 2573, 2575 n.2 (1983).

II. Defendants Meno And Moses Are Before The Court.

Messer argues that because Defendants Lionel R. Meno (former Commissioner of the Texas Education Agency) and Mike Moses (the current Commissioner) are not listed by name, in addition to that of Petitioner TEA, "the opinion and judgment of the Fifth Circuit is now final and nonappealable as to both Meno and Moses." Brief in Opposition at i. This argument is frivolous. Dr. Meno and Dr. Moses are defendants only in their official capacities.[1] In that capacity, they assume the identity of TEA. *Hafer v. Melo*, 502 U.S. 21, 26, 112 S.Ct. 358, 362 (1991). Accordingly, they are before the Court by virtue of naming TEA. Indeed, because this suit is now an action solely under Title VII of the Civil Rights Act of 1964, which creates a cause of action only against the "employer," 42 U.S.C. § 2000e-(b),-(f)(1), it is redundant to name Meno and Moses as defendants.

III. The Fifth Circuit Has Confused Statutory And Constitutional Standards For Affirmative Action.

The Respondent's Brief in Opposition highlights a salient feature of this case, which calls for Supreme Court review. The additional statutory provisions Messer says the Petition overlooked are all sections of Title VII and of EEOC regulations implementing that statute. Brief in Opposition at 4-7. That exposition serves only to underline the point made in the Petition at 14, that by the time Messer's case reached the Fifth Circuit, she asserted claims solely under Title VII, not under the Equal Protection Clause of the Fourteenth Amendment.

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[1] Initially, Messer sued Dr. Meno also in his individual capacity, for purposes of her damage claims under 42 U.S.C. § 1981 and 1983. However, early in the litigation she dismissed with prejudice her claims against Dr. Meno individually, and did not appeal the summary judgment as to her § 1981 and § 1983 claims.

This case thus offers the Court the opportunity to clarify an issue that has become confused at the circuit level: the relationship between Title VII and constitutional equal protection with respect to affirmative action by a public agency employer. This Court last spoke on the subject in *Johnson v. Transportation Agency*, 480 U.S. 616, 627 n.6, 107 S. Ct. 1442, 1450 n.6 (1987), as discussed in the Petition at 15-16.

Most circuits to consider the question since then have understood *Johnson* to have held that Title VII standards for affirmative action are distinct from and less stringent than those under equal protection analysis. *Duffy v. Wolle*, 123 F.3d 1026, 1036 (8th Cir. 1997) *cert. denied*, __ U.S. __, 118 S.Ct. 1839 (1998); *Edwards v. City of Houston*, 37 F.3d 1097, 1110 n.9 (5th Cir. 1994); *In re Birmingham Reverse Discrimination Employment Litigation*, 20 F.3d 1525, 1536 (11th Cir. 1994); *Brunet v. City of Columbus*, 1 F.3d 390, 405 (6th Cir. 1993), *cert. denied*, 510 U.S. 1164, 114 S. Ct. 1190 (1994); *Cunico v. Pueblo School Dist. No. 60*, 917 F.2d 431, 437 (10th Cir. 1990) ("The level of proof necessary to justify the consideration of race in an employer's hiring practices, however, differs depending on whether the challenge invokes the equal protection clause or Title VII," with review under the former "made under the more demanding 'strict scrutiny' analysis").

But more recent decisions of this Court have left courts of appeals in disarray as to how to apply *Johnson*. *See, Smith v. Virginia Commonwealth Univ.*, 84 F.3d 672, 690 (4th Cir. 1996) (MICHAEL, J., dessenting from en banc decision) (the majority's and concurrence's "reliance on the Supreme Court's decisions in *Adarand Constructors, Inc. v. Pena*, [515] U.S. [200], 115 S. Ct. 2097 (1995), and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S. Ct. 706 (1989), is a red herring [because] plaintiffs brought their complaint under Title VII and the Equal Pay Act, not the Equal Protection Clause") (record citation omitted); *City of Chicago v. Lindley*, 66 F.3d 819, 829 (7th Cir. 1995) (noting that,

in light of *Johnson*, "the applicability of that [Title VII] principle to the [Title VI] case under advisement is not at all clear," but assuming that Title VII standards apply). In *Birmingham, supra*, the Eleventh Circuit "recognized the struggle that district courts face in extracting guidance from the various multi-part Supreme Court opinions on the constitutionality of government-sponsored affirmative action programs developed in various contexts." *Id.*, 20 F.3d at 1534. That difficulty is exhibited in *Taxman v. Board of Education*, 91 F.3d 1547, 1559-1560 (3rd Cir. 1996) (en banc), *cert. dism'd*, __ U.S. __, 118 S.Ct. 595 (1997). *But see*, 91 F.3d at 1568 (SLOVITER, C.J., dissenting) ("although the School Board is a public employer, . . . because we are presented with no constitutional claim [, t]herefore, we must measure the Board's actions under the restraints imposed by Title VII rather than the more demanding ones imposed on government action by the Equal Protection Clause").

As previously noted, in the instant case the Fifth Circuit ignored *Johnson* altogether and relied entirely on its own equal protection jurisprudence to conclude that TEA's affirmative action efforts created a fact issue for purposes of Messer's Title VII claim. Petition at 14-17. Completing the logical circle, the Fifth Circuit in subsequent decisions has cited its *Messer* opinion as authority on constitutional equal protection issues. *Lesage v. State of Texas*, 158 F.3d 213, 216-217, 221 (5th Cir. 1998); *Harris v. City of Houston*, 151 F.3d 186, 196 (5th Cir. 1998).

If *Johnson v. Transportation Agency* is no longer good law – *cf., Taxman*, 84 F.3d at 683 (WILKINS, J., concurring) – this Court should say so. If, however, that decision is still viable, the Court should resolve the disparity of interpretations among the circuits. In any event, the Court should grant *certiorari* to clarify the law on this issue.

IV. The Fifth Circuit Has In Effect Created A Double Standard For Summary Judgment On Title VII Disparate Treatment Claims.

Subsequent rulings by the Fifth Circuit have made it even more apparent that, as discussed in the Petition at 7-13, the *Messer v. Meno* decision imposes a lighter burden on white Title VII plaintiffs complaining of affirmative action than on minority plaintiffs alleging discrimination.

In *Lesage*, a white plaintiff sued under Title VI and equal protection, asserting that the University of Texas racially discriminated against him when it denied him admission to a doctoral program. *Id.* at 158 F.3d 215. Relying on its *Messer v. Meno* decision, the Fifth Circuit held that, although the plaintiff did not controvert the defendants' proof that he did not qualify for ultimate admission into the program, nevertheless a fact issue of discrimination was created by testimony that members of the admissions committee were "interested in qualified people of Hispanic and African American background," were "very sensitive to those issues and very concerned to get qualified minority students." *Id.* at 220. By contrast, in *Johnson*, this Court approved a program which "authorize[d] that consideration be given to affirmative action concerns when evaluating qualified applicants." *Id.*, 480 U.S. at 638, 107 S. Ct. at 1455. *See also, Price Waterhouse v. Hopkins*, 490 U.S. 228, 245 n.10, 109 S. Ct. 1786, 1788 n. 10 (1989) (Title VII does not authorize relief for systemic discrimination to individuals as to whom the systemic discrimination has had no effect).

Nobody who is familiar with recent trends in Title VII litigation can credibly contend that a minority plaintiff could overcome summary judgment on facts equivalent to those found sufficient in *Lesage* – i.e., that the employer was "interested" in attracting qualified white employees along with minorities.

Certiorari should be granted to examine the legitimacy and validity of the Fifth Circuit's approach to Title VII.

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